





UNIVERSITY  
OF CALIFORNIA  
LOS ANGELES

SCHOOL OF LAW  
LIBRARY

Faculty Library





Digitized by the Internet Archive  
in 2007 with funding from  
Microsoft Corporation



# REPORTS

OF

513

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1881.

BY

JNO. P. TILLMAN,

SPECIAL REPORTER.

40629

VOL. LXIX.

MONTGOMERY, ALA.:

PUBLISHED BY JOEL WHITE,

---

1883.



✓  
KFA

45

A2

v.69

Copy 2

✓  
~~F. L. S.~~  
~~Ala 70~~  
~~AL 11~~

ENTERED according to act of Congress, in the year 1883, by  
JOEL WHITE,  
In the office of the Librarian of Congress at Washington, D. C.

OFFICERS OF THE COURT  
DURING THE TIME OF THESE DECISIONS.

---

ROBERT C. BRICKELL, CHIEF JUSTICE, *Huntsville, Ala.*

GEORGE W. STONE, ASSOCIATE JUSTICE, *Montgomery, Ala.*

H. M. SOMERVILLE, ASSOCIATE JUSTICE, *Tuskaloosa, Ala.*

H. C. TOMPKINS, ATTORNEY GENERAL, *Montgomery, Ala.*

JOHN W. A. SANFORD, CLERK, *Montgomery, Ala.*

JUNIUS M. RIGGS, MARSHAL, *Montgomery, Ala.*

FRANCIS L. PETTUS, PRIVATE SECRETARY, *Selma, Ala.*





# TABLE OF CASES.

|                                      |     |                                       |     |
|--------------------------------------|-----|---------------------------------------|-----|
| Acree ats. Thompson.....             | 178 | Costephens et al. v. Dean et al. .... | 385 |
| Ala. Great So. R. R. Co. v. Kil-     |     | Crenshaw v. Carpenter, Ex'r....       | 572 |
| lian.....                            | 277 | Crumley Bros. v. Bryan & Co....       | 91  |
| Alexander v. Wheeler.....            | 332 | Crumley Bros. v. Winter & Co....      | 91  |
| Allen v. Kellam.....                 | 442 | Crump v. Crump.....                   | 156 |
| Andrews & Co. ats. Farrow.....       | 96  | “ ats. Daffron.....                   | 77  |
| Appleby ats. Griffin.....            | 409 | Daffron v. Crump.....                 | 77  |
| Armstrong ats. Hooper.....           | 343 | Daniel ats. Comer.....                | 434 |
| Atkinson v. Wiggins.....             | 190 | Danner & Co. v. Brewer & Co....       | 191 |
| Bank of Mobile v. M. & O. R. R. Co.  | 305 | Davis v. Bedsole.....                 | 362 |
| Beale ats. Posey.....                | 32  | Dean et al. ats. Costephens et al.    | 385 |
| Beard ats. Stewart.....              | 470 | Desribes v. Wilmer.....               | 25  |
| Beck v. Glenn.....                   | 121 | Dorrance ats. Chamberlain &           |     |
| Bedsole ats. Davis.....              | 362 | Parker.....                           | 40  |
| Berney v. The State.....             | 220 | Dothard v. Sheid.....                 | 135 |
| Berney, John v. The State.....       | 233 | Dugger v. Collins & McRae.....        | 324 |
| Bibb ats. Hawley.....                | 52  | East et al. v. Eichelberger.....      | 187 |
| Bird v. Womack.....                  | 390 | Eichelberger ats. East et al.....     | 187 |
| Bixler ats. Sweeney.....             | 539 | Ellerson v. The State.....            | 1   |
| Boon v. The State.....               | 226 | <i>Ex parte</i> Holton.....           | 164 |
| Bowden ats. Williams.....            | 433 | “ “ Sayre.....                        | 184 |
| Bradley v. The State.....            | 318 | “ “ Smith.....                        | 528 |
| Bradshaw ats. Bruce.....             | 360 | Farrow v. Andrews & Co.....           | 96  |
| Bragg v. The State.....              | 204 | Faulk & Martin ats. Collier & Son     | 58  |
| Brewer & Co. ats. Danner & Co.       | 191 | Fitzsimmons, Trustee, v. Howard.      | 590 |
| Bromberg Bros. v. Heyer Bros....     | 22  | Flournoy ats. McCullough.....         | 189 |
| Bruce v. Bradshaw.....               | 360 | Floyd ats. Madden.....                | 221 |
| Bryan & Co. ats. Crumley Bros....    | 91  | Folmar v. Folmar.....                 | 84  |
| Burks v. Hubbard.....                | 379 | Frank v. Pickens.....                 | 369 |
| Busbin v. Ware.....                  | 279 | Fry ats. Mobile Savings Bank....      | 348 |
| Bush & Co. ats. Yarbrough & Co.      | 170 | Furniss ats. Shipman.....             | 555 |
| Carpenter, Ex'r, ats. Crenshaw.      | 572 | Gantt ats. Pollock & Co.....          | 373 |
| Carson v. The State.....             | 235 | Garrett v. Garrett.....               | 429 |
| Central R. R. & B. Co. of Geor-      |     | Glenn ats. Beck.....                  | 121 |
| gia v. Letcher.....                  | 106 | Green v. The State.....               | 6   |
| Chamberlain & Parker v. Dor-         |     | Green & Co. ats. Hall.....            | 368 |
| rance.....                           | 40  | Greenville, City of, ats. Childers.   | 103 |
| Chambers v. Ringstaff.....           | 140 | Griffin v. Appleby.....               | 409 |
| Childers v. City of Greenville....   | 103 | “ “ Spence, Adm'r.....                | 393 |
| City of Greenville ats. Childers.... | 103 | Guice ats. Lowe.....                  | 80  |
| Collier & Son v. Faulk & Martin....  | 58  | Gulf City Paper Co. ats. Rapier.      | 476 |
| Collier v. The State.....            | 247 | Hall v. Cook.....                     | 87  |
| Collins ats. Lehman, Durr & Co.      | 127 | Hall v. Green & Co.....               | 368 |
| Collins & McRae ats. Dugger....      | 324 | Harman v. The State.....              | 248 |
| Collins, Guardian v. Toomer et       |     | Harris ats. Munchus.....              | 506 |
| al. Ex'rs.....                       | 14  | Hawley v. Bibb.....                   | 52  |
| Comer v. Daniel.....                 | 434 | Hayes v. Mitchell.....                | 452 |
| Conner ats. The State.....           | 212 |                                       |     |
| Cook v. Cook et al. Ex'rs.....       | 294 |                                       |     |
| Cook ats. Hall.....                  | 87  |                                       |     |

|   |     |   |     |
|---|-----|---|-----|
| Heflin v. Milton                                | 354 | Milner ats. Kingsbury                       | 502 |
| Heyer Bros. ats. Bromberg Bros.                 | 22  | Milton ats. Heflin                          | 354 |
| Higgins ats. Williams                           | 517 | Mitchell ats. Hayes                         | 452 |
| Hill, Assignee, ats. Pollock & Co.              | 515 | Mobile, Bank of, v. M. & O.R.R. Co.         | 305 |
| Hill v. Townsend and Eubanks                    | 286 | Mobile County, ex rel. v. Stone, Treasurer  | 206 |
| Hilliard ats. Jones                             | 300 | Mobile & Ohio R. R. Co. ats. Bank of Mobile | 305 |
| Hirschfelder, Adm'r, v. Levy & Co.              | 351 | Mobile Savings Bank v. Fry                  | 348 |
| Holcombe v. The State                           | 218 | Mohon v. Tatum, Guardian                    | 466 |
| Holton, <i>Ex parte</i>                         | 164 | Mohr v. Lemle                               | 180 |
| Hooper v. Armstrong                             | 343 | Montgomery M. B. & L. Ass'n v. Robinson     | 413 |
| Hooper v. Savannah & Memphis R. R. Co.          | 529 | Montgomery M. B. & L. Ass'n ats. Wimbish    | 575 |
| Hooper v. Yonge                                 | 484 | Moog ats. Levy & Co                         | 63  |
| Howard ats. Fitzsimmons, Trust                  | 590 | Moog v. Strang                              | 98  |
| Hubbard ats. Burks                              | 379 | Mooney v. Walter                            | 75  |
| Hughes ats. Renfro's Adm'r                      | 581 | Morrison v. Stevenson                       | 448 |
| Hundley v. Yonge                                | 89  | Munchus v. Harris                           | 506 |
| Jackson & Dean v. The State                     | 249 | Murfee ats. Nelson, Ex'r                    | 598 |
| Johnson v. The State                            | 253 | Murphy ats. Robinson                        | 543 |
| Johnson v. The State                            | 593 | Nelson, Ex'r, v. Murfee                     | 598 |
| Jones v. Hilliard                               | 300 | O'Bannon, ex rel. ats. Leigh                | 261 |
| Jones v. Wilson, Adm'r                          | 400 | Pace & Cox v. The State                     | 231 |
| Kellam ats. Allen                               | 442 | Page v. The State                           | 229 |
| Ketler ats. Wilkinson                           | 435 | Pickens ats. Frank                          | 369 |
| Kight v. Luke                                   | 423 | Pinney v. Williams                          | 311 |
| Killian ats. Ala. G't So. R.R. Co.              | 277 | Pollock & Co. v. Gantt                      | 373 |
| King ats. Wharton                               | 365 | Pollock & Co. v. Hill, Assignee             | 515 |
| Kingsbury v. Milner                             | 502 | Posey v. Beale                              | 32  |
| Lake ats. Security Loan Ass'n                   | 456 | Powell v. The State                         | 10  |
| Lehman, Durr & Co. v. Collins                   | 127 | Pugh v. Youngblood                          | 296 |
| Lehman, Durr & Co. v. Shook                     | 486 | Ramsey v. Young                             | 157 |
| Lehman v. Levy                                  | 48  | Rapier v. Gulf City Paper Co.               | 476 |
| Leigh v. The State, <i>ex rel.</i> O'Bannon     | 261 | Redd v. The State                           | 255 |
| Lemle ats. Mohr                                 | 180 | Renfro's Adm'r v. Hughes                    | 581 |
| Letcher, ats. Central R. R. & B. Co. of Georgia | 106 | Rhodes ats. McBryde                         | 133 |
| Levy & Co. ats. Hirschfelder, Adm'r             | 351 | Rich v. Thornton                            | 473 |
| Levy ats. Lehman                                | 48  | Ringstaff ats. Chambers                     | 140 |
| Levy & Co. v. Moog                              | 63  | Robinson ats. Montgomery M. B. & L. Ass'n   | 413 |
| " " " " Van Hagan                               | 17  | Robinson v. Murphy                          | 543 |
| Levy ats. Weis                                  | 209 | Robinson, Adm'r, ats. Taylor, Adm'r         | 269 |
| Lott ats. The State                             | 147 | Savage v. Wolfe                             | 569 |
| Lowe v. Guice                                   | 80  | Savannah & Memphis R. R. Co. ats. Hooper    | 529 |
| Luke ats. Kight                                 | 423 | Sayre, <i>Ex parte</i>                      | 184 |
| Madden v. Floyd                                 | 221 | Schomacker Manufacturing Co. ats. Snow      | 111 |
| May ats. Wilkinson                              | 33  | Security Loan Ass'n v. Lake                 | 456 |
| Mayer & Co. v. Taylor & Co.                     | 403 | Security Loan Ass'n v. Weems                | 584 |
| McBride & Latimer ats. Slaughter                | 510 | Sheid ats. Dothard                          | 135 |
| McBryde v. Rhodes                               | 133 | Shipman v. Furniss                          | 555 |
| McCall v. McCurdy                               | 65  | Shook ats. Lehman, Durr & Co.               | 486 |
| McCall v. The State                             | 227 |   |     |
| McCarty v. Williams                             | 174 |   |     |
| McCollough v. Flournoy                          | 189 |   |     |
| McCurdy ats. McCall                             | 65  |   |     |
| Merrick & Sons ats. Winter                      | 86  |   |     |



## TABLE OF CASES.

VII

|   |     |   |     |
|---|-----|---|-----|
| Sistrunk, Adm'r, v. Ware.....   | 273 | Thompson v. Acree.....  | 178 |
| Slaughter v. McBride & Latimer.....                                       | 510 | Thornton ats. Rich.....                                       | 473 |
| Smith, <i>Ex parte</i> .....  | 528 | Toomer et al. Ex'rs, ats. Collins,<br>Guardian.....           | 14  |
| Smith v. Sweeney.....   | 524 | Townsend and Eubanks ats. Hill.....                           | 286 |
| Smith v. Vaughan.....   | 92  | Tuttle v. Walker.....   | 172 |
| Snow v. Schomacker Man'fg Co.....   | 111 |   |     |
| Spence, Adm'r, ats. Griffin.....  | 393 |   |     |
| Spicer v. The State.....  | 159 | Vanderveer v. Ware.....                                       | 38  |
| State ats. Berney.....  | 220 | Van Hagan ats. Levy & Co.....                                 | 17  |
| Berney, John.....   | 233 | Vaughan v. Smith.....   | 92  |
| Boon.....   | 226 |   |     |
| Bradley.....  | 318 | Walker ats. Tuttle.....                                       | 172 |
| Bragg.....  | 204 | Walter ats. Mooney.....                                       | 75  |
| Carson.....   | 235 | Ware ats. Busbin.....   | 279 |
| Collier.....  | 247 | Ware ats. Sistrunk, Adm'r.....                                | 273 |
| v. Conner.....  | 212 | Ware ats. Vanderveer.....                                     | 38  |
| ats. Ellerson.....  | 1   | Washington v. Washington.....                                 | 281 |
| Green.....  | 6   | Weems ats. Security Loan Ass'n.....                           | 584 |
| Harman.....   | 248 | Weems v. Weems.....   | 104 |
| Holcombe.....   | 218 | Weis v. Levy.....   | 209 |
| Jackson & Dean.....   | 249 | Wharton v. King.....  | 365 |
| Johnson.....  | 253 | Wheeler ats. Alexander.....                                   | 332 |
| Johnson.....  | 593 | Wiggins ats. Atkinson.....                                    | 190 |
| v. Lott.....  | 147 | Williams v. Bowden.....                                       | 433 |
| ats. McCall.....  | 227 | Williams v. Higgins.....                                      | 517 |
| <i>ex rel.</i> Mobile County v. Stone,<br>Treasurer.....                  | 206 | Williams ats. McCarty.....                                    | 174 |
| <i>ex rel.</i> O'Bannon ats. Leigh.....                                   | 261 | Williams ats. The State of Ala.<br><i>ex rel.</i> Pinney..... | 311 |
| ats. Pace & Cox.....  | 231 | Wilkinson v. May.....   | 33  |
| Page.....   | 229 | Wilkinson v. Ketler.....                                      | 435 |
| <i>ex rel.</i> Pinney v. Williams.....                                    | 311 | Wilmer ats. Desribes.....                                     | 25  |
| ats. Powell.....  | 10  | Wilson, Adm'r, ats. Jones.....                                | 400 |
| Redd.....   | 255 | Wilson v. Stewart.....  | 302 |
| Spicer.....   | 159 | Wimbish v. Montgomery M. B. &<br>L. Ass'n.....                | 575 |
| Woodbury.....   | 242 | Winter & Co. ats. Crumley Bros.....                           | 91  |
| Stevenson ats. Morrison.....  | 448 | Winter v. Merrick & Sons.....                                 | 86  |
| Stewart v. Beard.....   | 470 | Wolfe v. Savage.....  | 569 |
| Stewart ats. Wilson.....  | 302 | Wolff & Bro. ats. Wolffe.....                                 | 549 |
| Stone, Treasurer, ats. State, <i>ex</i><br><i>rel.</i> Mobile County..... | 206 | Wolffe v. Wolff & Bro.....                                    | 549 |
| Strang ats. Moog.....   | 98  | Womack ats. Bird.....   | 390 |
| Sweeney v. Bixler.....  | 539 | Woodbury v. The State.....                                    | 242 |
| Sweeney ats. Smith.....   | 524 |   |     |
|   |     | Yarbrough & Co. v. Bush & Co.....                             | 170 |
| Tatum, Guardian ats. Mohon.....   | 466 | Yonge ats. Hooper.....  | 484 |
| Taylor & Co. ats. Mayer & Co.....   | 403 | Yonge ats. Hundley.....                                       | 89  |
| Taylor, Adm'r, v. Robinson,<br>Adm'x.....                                 | 269 | Young v. Ramsey.....  | 157 |
|   |     | Youngblood ats. Pugh.....                                     | 296 |





# CASES

## IN THE

# SUPREME COURT OF ALABAMA.

---

DECEMBER TERM, 1881.

---

### **Ellerson v. The State.**

*Indictment for Selling or Removing Personal Property covered by Lien or Claim.*

1. *Indictment; when form prescribed by Code sufficient.*—An indictment for selling or removing personal property covered by lien or claim (Code of 1876, § 4353), which follows the form prescribed by the Code, is sufficient.

2. *Subscribing witness; when proof of execution of instrument must be made by.*—On the trial of a defendant indicted for a violation of section 4353 of the Code of 1876, it is error to allow the State to prove by the prosecutor, against the defendant's objection, the execution of a contract between him and the defendant, under which the lien or claim is asserted, and which is attested by a subscribing witness, without having first accounted for the absence of such witness.

3. *Ingredients of the offense denounced by § 4353 of the Code of 1876.*—To constitute the offense of selling or removing personal property covered by a lien or claim, it is necessary to prove, (1) that the prosecutor had a claim to the property under a written instrument, or a lien thereon created by law for rent or advances, or some other lawful or valid claim, verbal or written; (2) that the accused having knowledge of the existence of such claim or lien, removed or sold the property; and (3) that he removed or sold it for the purpose of hindering, delaying or defrauding the prosecutor; and it is error for the court to refuse a charge asserting that these facts must be established by the evidence beyond all reasonable doubt, before they can convict, and that a reasonable doubt of the existence of either of these facts, growing out of the evidence, entitled the defendant to an acquittal.

4. *Section 4353 of the Code construed.*—The words "lien" and "claim" are used in Section 4353 of the Code of 1876, prohibiting the sale or removal of personal property covered by a lien or claim, in a kindred sense, embracing mere charges or incumbrances upon the general ownership, and not the general ownership itself.

## [Ellerson v. The State.]

5. *Same ; when contract not protected thereby.*—The prosecutor and the defendant entered into a contract, which recites that the former had employed the latter and others to labor on a designated tract or parcel of land for the year, 1880, and in which the prosecutor stipulated to furnish the land, team and feed for the team, and tools to work the land, and seed to plant it, and the defendant stipulated to furnish the labor and feed it, to be responsible for all tools, implements and gear used by him, to treat the stock well and to do good work. It was further provided, that the prosecutor was to have one half of the crop made, and the defendant was to have the other half, from which he was to pay all advances made to him, and for any labor to help him, if it was necessary to hire help. *Held*, that the relation between the prosecutor and the defendant under the contract, was either that of master and servant, or that of tenants in common; and that in either relation the prosecutor had a general ownership in the crops raised under the contract, and not a lien or claim within the meaning of section 4353 of the Code of 1876; and that, therefore, the defendant could not be convicted, under that section, for selling or removing a part of such crops.

## APPEAL from Clay Circuit Court.

Tried before Hon. LEROY F. BOX.

At the Spring Term, 1881, of said court, Philip Ellerson, the defendant, was indicted, tried and convicted, under section 4353 of the Code of 1876, for selling or removing personal property, on which one Ulysses Lewis is alleged to have had a lien or claim, the indictment following the form prescribed by the Code, and alleging the value of the property to be twenty dollars. The defendant demurred to the indictment, and his demurrer having been overruled by the court, he pleaded not guilty, and upon this plea the cause was tried. On the trial the State, against the defendant's objection, was allowed to prove by Lewis the execution of a written contract between him and the defendant and three others, to which there was a subscribing witness, without having first accounted for the absence of such subscribing witness, and the defendant excepted. The contract, the substance of which is stated in the opinion, was then read to the jury. The evidence showed, that the defendant and the other laborers who signed the contract with him, raised a crop of corn and cotton under the contract; that in November, 1880, the corn so raised by them, having been gathered, was hauled up and put in a pile, and was then divided between Lewis, and the defendant and his co-laborers, the former getting one half, and the latter the other half thereof; and that then the defendant and the other laborers divided their half between themselves, and each one put his portion in his own crib; that Lewis advanced supplies to the defendant under said contract to enable him to make a crop, for which the defendant owed him a balance; that at the time the corn was divided, Lewis told the defendant not to remove the corn until a settlement could be had between them. Evidence was also introduced tending to show that the defendant, in January,



[Ellerson v. The State.]

1881, removed from the place, taking with him several bushels of the corn which had been allotted to him on the division, in a large sack. This being the substance of the evidence introduced on behalf of the State, the defendant asked in writing the following charges, among others :

1. "If you believe all the evidence in this case, you can not find the defendant guilty under this indictment." 4. "The elements of the offense charged in this indictment, are (1) that in Clay county and within twelve months before the finding of this indictment, the defendant sold or removed the corn for which the State has elected to proceed ; (2) that he removed or sold it with the purpose or intent to hinder, delay or defraud Mr. Lewis ; (3) that at the time he removed it, he was indebted to Lewis, and that Lewis had a lien on, or lawful claim to it ; and (4) that the defendant had, at the time he removed or sold it, knowledge of the existence of such lien or claim—all four of these constituents must be established by the evidence beyond all reasonable doubt, or you must acquit. A reasonable doubt in your minds, growing out of the evidence, of the existence of either one of the four elements, entitles the defendant to an acquittal at your hands." The court refused to give these charges, and the defendant separately excepted.

The rulings of the Circuit Court above noted are among the assignments of error made in this court.

PARSONS & PEARCE, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The indictment follows the form prescribed by the Code, and must be deemed sufficient.—Code of 1876, Form 57, p. 997.

2. Where the execution of a private writing having the attestation of a subscribing witness, is drawn in question directly, not incidentally, the evidence of the subscribing witness is the best and only admissible evidence, unless the impracticability of producing it can be satisfactorily shown, or unless the witness has become legally incompetent from some cause not chargeable as a fault against the party on whom the making of the proof devolves.—1 Greenl. Ev. § 569. *Bennett v. Robinson*, 3 Stew. & Port. 227. The rule may have been originally framed in reference to deeds, or other solemn instruments usually attested by witnesses, but it is now extended to every private writing which the parties may have chosen to cause to be attested. The witness is considered as the person selected and referred to for the purpose of proving the fact of execution, and the facts and circumstances attending it.—1 Green. Ev. § 569.

[Ellerson v. The State.]

The absence of the subscribing witness to the contract in writing between the accused and the prosecutor, from which the lien or claim to the corn the accused is charged with having removed or sold, is derived, was not accounted for, nor any reason given for not producing his evidence. The Circuit Court erred in permitting the prosecutor to prove the execution of the contract.

3. To constitute the offense charged in the indictment, three facts must have been proved by the prosecution: 1. That the prosecutor had a claim to the corn under a written instrument; or that he had a lien thereon created by law for rent or advances, or some lawful or valid claim, verbal or written. 2. That the accused having knowledge of the existence of such claim or lien, removed or sold the corn. 3. That he removed or sold it for the purpose of hindering, delaying or defrauding the prosecutor.—Code of 1876, § 4353. These facts, and each of them, the State was bound to prove fully. It is not sufficient that the weight of evidence may point to their existence, or to the existence of one or more of them. In criminal cases the State must prove beyond all reasonable doubt every fact which is a material constituent of the offense, and if they are not shown by evidence clear and satisfactory, leaving their existence free from reasonable doubt, whatever may be the preponderance of evidence, the jury should be instructed to acquit. This is the proposition asserted in the fourth charge requested by the appellant, embodying also, very properly, the affirmation that the State was bound to prove the venue, and that the offense had been committed within the period prescribed as a bar by the statute of limitations. The charge asserting a correct legal proposition applicable to the evidence, it was the duty of the Circuit Court to give it in the terms requested.

4. The contract between Lewis, the prosecutor, and the accused recites, that Lewis had employed the accused and others to labor on a tract or parcel of land known as the "Gordon place," for the year 1880. Lewis stipulated to furnish the land, team and feed for the team, and tools to work the land, and seed to plant it. The accused stipulated to furnish the labor and feed it, to be responsible for all tools, implements and gear used by them, to treat the stock well, and do good work. Lewis was to have one half the crop made, and the laborers the other half, from which they were to pay all advances made to them, and for any labor employed to help them, if it was necessary to hire help. There are questions of much practical importance to the proprietors and cultivators of lands in pursuance of contracts of this species, the case suggests, upon which it is not now necessary to express an opinion. Unless the right or title of Lewis to the crops grown is that of a mere lien, or

[Ellerson v. The State.]

a claim in the nature of a lien, the removal or selling of the crop by the accused, without the consent of Lewis, may have been wrongful, and even criminal, but would not fall within the interdiction of the statute upon which the indictment is founded. If the relation between Lewis and the accused is merely that of master and servant, the accused to be compensated for his services with one half of the crops, the ownership of the crops would reside exclusively in Lewis. Under the statute, Code of 1876, § 3475, the accused would have a lien on the crops for the portion of the crop, or value thereof, which he was entitled to receive by the terms of the contract. If the contract is not of hire, in which the laborer is to receive a portion of the crop as compensation for his services; if it is a contract by which the accused was let into the occupancy, and had the right to occupy the premises for the year, and was bound to the cultivation of the crops, the product to be equally divided with Lewis, the landowner, then, as between them, the relation of tenants in common of the crops would exist.—*Thompson v. Mawhinney*, 17 Ala. 362; *Strother v. Butler*, *Id.* 733; *Smyth v. Tankersley*, 20 Ala. 212; *Williams v. Nolen*, 34 Ala. 167. In neither relation—that of master and servant, or tenants in common—would Lewis have a lien on the crops, or a claim in or to them, in the sense of the word, claim, as it is used in the statute. If the contract is of hire, the ownership of the crops would reside exclusively in Lewis. For any and all injuries to them he alone would be entitled to sue. Upon them the laborer would have a lien or claim by virtue of the statute, and a sale or removal of them, for the purpose of hindering, delaying or defrauding the laborer in the assertion and enforcement of the lien, would fall within the statute. If they were taken and carried away by the laborer fraudulently or feloniously, he might be guilty of larceny under certain circumstances, but not of selling or removing property on which the employer had only a lien or claim. In the other view of the contract,—if the relation of tenants in common exists, and one of the co-tenants, for the purpose of defrauding the other, sold, converted, or concealed the crops, the offense denounced by § 4355 of the Code would be committed, but not the offense of selling or removing property, on which another had a lien or claim. The statute is not intended for the protection of tenants in common against the fraudulent acts of their co-tenants. Nor is it intended for the protection of the master against the fraudulent acts of his servants; nor yet to protect the general ownership of personal property. Liens have been multiplied by statutes, and to particular contracts liens on particular property are attached. For specific liens parties may contract, and legal remedies for the enforcement of such liens are au-



[Green v. The State.]

thorized. The protection of these liens from delay, hindrance or disappointment by the act of the general owner, or other person having knowledge of the lien, the statute is intended to afford. True, the statute employs the word *claim*, as well as the word *lien*, and the former is generally of larger meaning than the latter, and may embrace the general ownership, while the latter usually embraces simply a right to charge property. But it is evident the words are used in a kindred sense, embracing mere charges or encumbrances upon the general ownership, and not the general ownership itself. In no aspect of the case, as presented to the Circuit Court, had the prosecutor a lien, or a claim in the nature of a lien, or encumbrance upon the corn, charged to have been sold and removed by the accused. He was the owner of it solely and exclusively, or as a tenant in common with the accused. Whether the one or the other is the true relation arising out of the contract, it is not necessary to determine; for in neither relation could the accused be guilty of the offense with which he is charged.

The judgment of the Circuit Court must be reversed, and a judgment here rendered discharging the appellant from further prosecution.

## Green v. The State.

### *Indictment for Murder.*

1. *Homicide; conduct of deceased to be considered in determining degree; self-defense.*—If the circumstances attending a homicide, caused by a pistol shot fired by the accused in a rencounter not shown to have been brought on by him, both parties being armed, are such as to create the impression that the deceased had drawn or commenced to draw his pistol before the accused drew or attempted to draw his, or if a reasonable doubt is thereby generated as to whether such was the case or not, then such conduct on the part of the deceased should be considered in determining the grade of the homicide; but the homicide can not be thereby reduced to self-defense, unless the deceased made the first hostile, dangerous demonstration, and the accused had no other reasonable mode of escape.

2. *Same; when uncommunicated threat admissible in evidence.*—In such case, no witness having seen the parties at the instant the fatal shot was fired, but there being ground for argument at least, from the evidence, that the deceased must have taken some action in the matter of drawing his pistol before the accused fired, a threat made by the deceased while loading his pistol shortly before the rencounter, to the effect that before he would be run over by the accused he would kill the accused, or the accused would kill him, is admissible in evidence, although it was not communicated to the accused, as tending to show the *animus* of the deceased so recently before the homicide as to authorize its consideration

[Green v. The State.]

by the jury, with the other testimony, in ascertaining the conduct of the parties immediately before the firing.

3. *Same; when communicated threat inadmissible.*—Where the accused is charged with murder, and there is no evidence tending to show that the fatal act was committed in self-defense, a threat made by the deceased in the presence of, and to the accused, about a week before the homicide, that before the accused should marry a certain woman, he would kill the accused, is not admissible in evidence.

#### APPEAL from Macon Circuit Court.

Tried before HON. JOHN P. HUBBARD.

At the Spring Term, 1882, of said court, Bill Green, the appellee, was indicted and tried for the murder of John Tanner, and was convicted of murder in the second degree. The cause was tried on the plea of not guilty; and on the trial, the State examined as a witness one Martha Holland, whose testimony, while somewhat inconsistent, one part with another, may be substantially stated as follows: That one night in the latter part of December, 1881, the deceased, the defendant, and one Anderson Lewis were at her house; that she was cooking the defendant's meals about that time, and he came that night to get his supper as usual; that about the time he came in, he asked witness to fry some meat for him, when the deceased said that the witness should not fry the meat for him, and told him to fry his own meat, as he, the deceased, was doing; that the defendant then went out of the house, and, as he left, the witness said to him that she would fry his meat for him; that defendant was gone about two minutes and then came back, and asked witness whether she had fried his meat, to which the witness replied that she had not, and the defendant then said, "Damned if I don't want my meat fried;" that the deceased then said, "No, she shan't do it; you fry it yourself as I fried mine;" that at the time the defendant came back into the house the deceased was sitting before the fire eating his supper, and that after the last remark made by him, given above, he continued to eat until he had finished, and then got up and went to a table in the room, on which was a lamp, carrying the plate out of which he had been eating in his right hand, and put it on the table; that when the deceased got up to go to the table, defendant said, "Tanner, why do you treat me so," to which the deceased answered, "She shan't fry your meat;" that defendant then said, "You say she shan't fry my meat," to which deceased answered, "No;" that defendant immediately repeated the question, and the deceased made the same answer, "and immediately in giving this answer, a pistol fired, and some one jumped from the door on the piazza, and ran off, and I did not see the defendant any more." She further testified that the defendant had moved to the door while talking to the deceased; that at

[Green v. The State.]

the time the pistol was fired, and immediately prior thereto, she was not looking at either the defendant or the deceased; but that as soon as she heard the report of the pistol, she turned her head and looked at the deceased, who was advancing from the table towards the fire-place, with a pistol in his right hand pointing towards the door; that he told witness that the defendant had shot and killed him, and he then sunk on his knees, and died in a few minutes; that witness did not know where the deceased got his pistol; that she was not related to either party; that she had also been cooking for the deceased, and that the shooting took place about eight o'clock at night. The defendant offered to prove by this witness, "that about dusk of the same evening that Tanner was shot, he loaded his pistol and said to witness: 'Before I will be run over by Bill Green, I will kill Bill, or Bill will kill me.' It appeared that witness never told defendant, Bill Green, what Tanner said." But the court, on the State's objection, refused to permit him to make the proof, and he excepted. The State also examined Anderson Lewis as a witness, "and his testimony was the same as that of the witness, Martha Holland." It was also shown on behalf of the State, by the physician who was called in to see the deceased after he was dead, that the ball "entered through the left shoulder blade, ranging a little to the right, and the person who fired the shot must have been in the rear of the deceased."

The defendant then offered to prove by a witness examined on his behalf, that about a week before the shooting, the witness heard the deceased say to the defendant, that before the latter should marry Martha Holland, he, the deceased, would kill him. But the court, on the State's objection, refused to permit the defendant to make the offered proof, and the defendant excepted.

This being substantially all the evidence, "the court, among other things, charged the jury, that, under the evidence in this case, the question of self-defense did not arise;" and to this charge the defendant excepted. The defendant then asked the court in writing to charge the jury, that "if defendant, without fault on his part, was forced to shoot Tanner, in order to save his life, or his body from great harm, he had a right to strike;" but the court refused this charge, and the defendant excepted.

The rulings of the Circuit Court above noted, with others not passed on by this court, are assigned as error.

WALPOLE C. BREWER, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.



[Green v. The State.]

(No briefs came to the hands of the reporter.)

STONE, J.—Two witnesses were present when the homicide charged in this case was perpetrated. Neither of them was looking towards the parties when the pistol was fired, and neither of them saw the act done. There is obscurity in the testimony relating to the conduct of the parties immediately preceding and attending the fatal act. Angry words were being interchanged, and the deceased spoke last. The ball entered at the back, which shows that deceased was not facing the accused when he received the fatal wound. The obscurity arises out of the following testimony: Immediately on hearing the report of the pistol, the witness testifies that she looked at the deceased, and he then had his arm extended, pistol in hand, pointing towards the door,—the place at which the accused had been last seen, and from which the pistol was fired. She saw the smoke of the pistol at the door, and heard some one spring out on the gallery. The ball entering at the back, if true, is unmistakable proof of the position the deceased occupied when he was shot. If the witness be believed, her eyes were thrown on him immediately after she heard the firing, and he had then faced around, and was pointing his pistol in the direction of the place where the accused must have been standing when he fired. This is a question for solution by the jury. It is their duty to reconcile the testimony if they can, and to ascertain, if possible, what, if anything, deceased was doing when he was shot. If the circumstances are such as to create the impression that deceased had drawn, or commenced to draw his pistol before the accused drew, or attempted to draw his pistol—or, if the circumstances generate a reasonable doubt whether such was not the case—then this should be considered in determining the grade of the homicide. It could not reduce it to self defense, unless deceased made the first hostile, dangerous demonstration, and the accused had no other reasonable mode of escape.—*Judge v. The State*, 58 Ala. 406.

There being ground for argument at least, that the deceased must have taken some action in the matter of drawing his pistol before the accused fired, this lets in the threat the witness testifies the deceased made, while loading his pistol shortly before the rencontre. If believed, it tended to show the *animus* of the deceased towards the accused, so recently before the homicide, as to authorize its consideration by the jury in ascertaining the conduct of the parties immediately before the firing.—*Burns v. The State*, 49 Ala. 370; *Myers v. The State*, 62 Ala. 599; *Roberts v. The State*, 68 Ala. 156. In ruling that this testimony should have been received, it is not our intention to intimate an opinion that the accused fired in self-defense.

[Powell v. The State.]

All we decide is, that the testimony should have gone to the jury, to be weighed by them with the other testimony. Unless the jury shall be convinced, that the deceased was in the act of drawing, or had drawn his pistol before the accused commenced to draw his, or unless a reasonable doubt is raised on this question, and in addition thereto, that the accused had no other reasonable mode of escape from the present impending peril, then he would not stand excused for firing the fatal shot. If the accused commenced first to draw, that authorized the deceased to draw in defense, and any peril thereby brought on the accused would be of his own producing, and would deny to him the plea of self-defense. The position in which the parties stood to each other at the time, should be considered in this connection.

The threat alleged to have been made by the deceased a week before the homicide, was properly excluded.—*Payne v. The State*, 60 Ala. 80.

What we have said above relates to the degree of the homicide. That offense under our statute is divided into four degrees, or classes; murder in the first and second degrees, and manslaughter in the first and second degrees. These several offenses are fully defined in our former rulings.—*Ex parte Nettles*, 58 Ala. 268; *Fields v. The State*, 52 Ala. 348; *Judge v. The State*, 58 Ala. 406; *Mitchell v. The State*, 60 Ala. 26; *McManus v. The State*, 36 Ala. 285; *Cates v. The State*, 50 Ala. 166; *Grant v. The State*, 62 Ala. 233. We are not prepared to say there was any evidence tending to show the shooting was in self-defense, and hence can not say the court erred in the instructions given and refused on that subject.

The judgment of the Circuit Court is reversed and the cause remanded. Let the prisoner remain in custody until discharged by due course of law.

## Powell v. The State.

*Indictment for Sale of Spirituous, Vinous or Malt Liquors contrary to Local Statute.*

1. *Indictment under § 4806 of the Code; its sufficiency.*—Under section 4806 of the Code, an indictment for a violation of a local statute prohibiting the sale of vinous or spirituous liquors within a specified territory, charging that the defendant “did sell vinous or spirituous liquors without a license and contrary to law,” is sufficient.

2. *When part of statute violative of constitution may be expunged with-*  
VOL. LXIX.

## [Powell v. The State.]

*out affecting other parts.*—If the provisions of an act of the legislature are all connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning, that it can not be presumed that the legislature would have passed the one without the other, the constitutional invalidity of one part of the act will vitiate the other, and both must fall together. But if the parts of an act are perfectly distinct and separable, and are not dependent the one on the other, and effect can thereby be given to the act, the unconstitutional part of the act may be expunged, and the other parts be permitted to stand; and this too, even if the valid and invalid parts are in the same section.

3. *Same; local statute prohibiting sale of liquors construed.*—Where an act of the legislature, prohibiting the sale or other disposition of any vinous, spirituous or malt liquors, under a penalty, contains a proviso exempting from the prohibition of the act the sale of domestic wines manufactured from grapes grown in this State, a discrimination is thereby made against wines made from grapes grown in other States, but not against foreign spirituous or malt liquors. And while it may be, that this legislative discrimination is invalid so far as concerns wines imported from other States, under the principle decided in *Welton v. Missouri*, 91 U. S. 275, and followed by this court in *Vines v. The State*, 67 Ala. 73—a point not decided—the rest of the law would be unaffected thereby, and would stand.

4. *License to sell liquors not a contract.*—A license issued under the general statute, to a dealer in liquors, is, in no sense, a contract between the State and the licensee, and it is not protected by the contract clauses of the Federal constitution and of the constitution of this State. It is a mere *permit* and can be revoked by the legislature at pleasure.

## APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

At the Spring Term, 1881, of said court, the grand jury returned an indictment against the appellant, containing two counts, charging in the one, that he “did sell vinous or spirituous liquors without a license and contrary to law,” and in the other, that he “did sell, give away or otherwise dispose of vinous, spirituous or malt liquors or intoxicating bitters or beverages within five miles of Rehoboth church, in Crenshaw county.” The defendant demurred to the indictment, as appears from the judgment entry, but the grounds of demurrer are not stated in the record. The court overruled the demurrer, and the case was then tried on the plea of not guilty. The evidence introduced on the trial showed that the defendant, on 15th April, 1881, and before indictment found, sold to one of the witnesses, one pint of whiskey at defendant’s store, which was within three miles of Rehoboth church, in Crenshaw county; that the defendant had duly applied for and obtained a license as a retailer under the general law, which had not expired but was still of force; that the amount he had paid therefor had never been refunded to him, and that he had never applied for the refunding thereof. This being all the evidence the court refused, at the request of the appellant, to charge the jury, that if they believed the evidence they must



[Powell v. The State.]

find him not guilty; and on the written request of the solicitor, charged the jury that if they believed the evidence, they must find the appellant guilty as charged in the indictment. To these rulings of the court the appellant separately excepted. The jury returned a verdict of guilty, on which judgment was rendered; and from this judgment this appeal was taken.

R. M. WILLIAMSON, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The indictment, in this case, is framed in full accordance with the requirements of section 4806 of the present Code, relating to the retailing of spirituous liquors. The only averment requisite is, that “the defendant sold vinous or spirituous liquors without a license, and contrary to law;” and the statute expressly provides that this is sufficient to cover “all violations of special and local laws, regulating the sale of spirituous liquors within the place specified.”—Code 1876, § 4806; *Block v. The State*, 66 Ala. 493; *Ulmer v. The State*, 61 Ala. 208; Acts of 1880–81, pp. 154–156.

The indictment charges the defendant with the violation of a local law, by selling spirituous liquors within five miles of Rehoboth church, in Crenshaw county, contrary to the provisions of an act of the General Assembly, approved March 1, 1881.—Acts 18–0–81, pp. 154–6.

The constitutionality of this act is assailed chiefly on the ground that it is violative of the commercial clause of the Federal constitution, which confers on Congress the power to regulate commerce among the several States.—Const. U. S., Art. 1, sec. 8, sub-div. 3.

The first section of the act in question provides that “it shall be unlawful for any person to sell, give away, or otherwise dispose of any *vinous, spirituous or malt* liquors, or *intoxicating bitters or beverages*” within certain prohibited limits, which are specially described, including among others the area within “five miles of Rehoboth church, in Crenshaw county.” Then follows a *proviso* in these words:

“*Provided*, that this act shall not be so construed as to prevent the use of wines for sacramental purposes, or to abridge the right of any person from giving one or more drinks to any person at his or her private residence, and that it *shall not prevent the sale of domestic wines* in quantities less than one quart, *manufactured from grapes grown in this State*, in which no alcoholic or spirituous liquors were used in the manufacture

[Powell v. The State.]

thereof; *provided further*, that if any person or persons have taken out license for the year 1881, the license money shall be refunded for the unexpired term of such license by the proper authorities."—Acts 1880–81, pp. 155, 156.

It is plain that the only discrimination in the operation of this act is against *wines*, or *vinous* liquors, manufactured from grapes grown in other States than Alabama. There is no discrimination, or hostile legislation, against other foreign liquors, spirituous, malt or alcoholic. These, whether foreign or domestic, are placed upon the same exact terms of commercial equality, and are accorded equal facilities in traffic. It may be that this legislative discrimination is invalid so far as concerns *wines* imported from other States, under the principle decided in *Welton v. State of Missouri*, 91 U. S. 275, which was followed by this court in *Vines v. The State*, 67 Ala. 73. This point, however, we do not now decide.

It is sufficient for us to say, that, conceding the act in question is unconstitutional so far as concerns this particular feature of the *proviso*, the rest of the law is unaffected by it, and must be permitted to stand on the clearest principles of construction. It does not matter that the objectionable and valid parts of the statute are in the same section of the act. If they are perfectly distinct and separable, and are not dependent the one on the other, the courts will permit the one part to stand, though the other may be expunged as unconstitutional, provided effect can thus be given to the legislative intent. But where the provisions are all connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other, the constitutional invalidity of the one part will vitiate the other, and both must then fall together.—*Cooley's Const. Lim.* 177–178; *Allen v. Louisiana*, 103 U. S. 80; *Lowndes County v. Hunter*, 49 Ala. 507.

We think, under these principles, that, although the act be inoperative so far as it discriminates *against* imported wines, or *in favor* of domestic wines, as the case may be, the remainder of the act is not necessarily unconstitutional, but may be permitted to stand. The authority of *Tiernan v. Rinker*, 102 U. S. 123, we think, fully sustains this construction.

The defendant is charged specifically, under the proof made, with selling one pint of *whiskey*. The evidence introduced by the State had no reference to the sale of wines of any character by him, domestic or imported. The act proved comes within the influence of that portion of the law which prohibits the sale of spirituous or alcoholic liquors, and the validity of which remains unimpaired.

[Collins, Guardian, v. Toomer et al. Ex'rs.]

It is immaterial that the defendant had obtained a license to engage in the liquor traffic, and was doing business under it at the time of the passage of the act under consideration. Such a license was a mere *permit*, revocable at the option of the State. It was, in no sense, a *contract* between the licensee and the State within the meaning of the Federal constitution which prohibits the States from passing any law impairing the obligations of contracts; or within the meaning of a similar clause in our own State constitution. It is settled by the vast weight of authority that such licenses can be revoked by the legislative department at pleasure.—Cooley's Const. Lim. 282-283; note 2, and cases cited; *Fell v. The State*, 20 Amer. Rep. 83; *Boyd v. Alabama*, 94 U. S. 645, and authorities there cited.

The judgment of the Circuit Court is affirmed.

## Collins, Guard'n, v. Toomer et al. Ex'rs.

### *Final Settlement of Accounts of Executors.*

*Construction of will.*—A testator, by the first clause of his will, after having bequeathed and devised all his estate, real and personal, to his six children, to be divided between them equally when the youngest shall have become of age, provides as follows: "And in case either or any of my children shall die before my estate shall be divided, then it is my will, that the share of such child or children shall be divided equally between the survivors, when partition is made, providing always, that the child or children of such deceased children shall be entitled to their parent's share." By the second clause of the will, he provides as follows: "I desire that my children shall be supported and educated by the rents, issues and profits of my estate, while it shall be kept together, and I wish that my friend T. shall attend to and manage my domicile for the benefit of my family, and that my executors shall make him such compensation as they may think right and proper for his services. It is my particular request that my young children shall be educated, and that their tuition be paid, as I have said, out of the profits of my estate." A daughter of the testator, after his death, and before the period of division, married and died, leaving a child. On final settlement by the executors, this child, by his guardian, claimed an account for maintenance and education, after the death of his mother, equal to that which, during the same time, had been allowed to the surviving children of the testator. *Held*,

1. That by the second clause of the will the testator provides solely for the support and education of the testator's own children, the children designated by name in the first clause, constituting his *family*, for whose benefit his domicile was to be attended to and managed by his friend, during the minority of his youngest child; and not for the support and education of a child of a deceased child.

2. That under the will, the executors are charged with the duty of maintaining and educating the children of the testator, and they are not



[Collins, Guardian, v. Toomer et al. Ex'rs.]

clothed with a power of appointing or disposing of any property to or among them.

APPEAL from Mobile Probate Court.

Tried before Hon PRICE WILLIAMS, JR.

In the matter of the final settlement of the accounts of Edward T. Toomer and John C. Chamberlain, as the executors of the last will and testament of B. C. Gallup, deceased. The facts are stated in the opinion.

BOYLES, FAITH & CLOUD, for appellant, cited 43 Md. R. 307; 78 Penn. St. 40; 50 Miss. 15; 13 New Hamp. 521; Code of 1876, § 2216.

HERNDON, CROOM & LEWIS, *contra*, cited 2 Jarman on Wills, 690; *Continental Life Ins. Co. v. Webb*, 54 Ala. 699; *Russell v. Russell*, 64 Ala. 500; *McGuire v. Westmoreland*, 36 Ala. 594; 2 Sugden on Powers, chap. xv.

BRICKELL, C. J.—By the first clause or paragraph of the will of Benjamin C. Gallup, there is a general bequest and devise of all the estate, real and personal, of the testator remaining after the payment of debts, to his six children, to be divided between them equally. The period of division was postponed until the youngest child became of age. The conclusion of the clause is in these words: "And in case either or any of my children shall die before my estate shall be divided, then, it is my will, that the share of such child or children, shall be divided equally between the survivors, when partition is made, providing always, that the child or children of such deceased children shall be entitled to their parent's share. I have already advanced to my daughter, Mary Francis Heirs and her husband, about two thousand dollars, and I desire that this advance, without interest, shall be deducted from her share, when division is made." The second clause or paragraph of the will, is in these words: "I desire that my children shall be supported and educated by the rents, issues and profits of my estate, while it shall be kept together, and I wish that my friend, Edward T. Toomer, shall attend to and manage my domicile for the benefit of my family, and that my executors shall make him such compensation as they may think right and proper for his services. It is my particular request, that my young children shall be educated, and that their tuition be paid, as I have said, out of the profits of my estate." The daughter of the testator, Eugenia, after his death, married and died before the period of division, leaving a child, of whom the appellant, Collins, is guardian. The period for the division of the

[Collins, Guardian, v. Toomer et al. Ex'rs.]

estate having arrived, on the final settlement of the administration of the executors, in the Court of Probate, the appellant for his ward, claimed an account for maintenance and education, after the death of her mother, equal to that which, during the same time, had been allowed to the surviving children of the testator. The claim was disallowed by the Court of Probate.

The first clause or paragraph of the will, having in terms limited over to the child or children of either of the children of the testator dying before the partition of the estate, the share of the estate to which the deceased parent would have been entitled, if living, the claim of the appellant rests upon the proposition, that such child or children, on the death of the parent, becomes entitled to the support and education during the period the estate is required to be kept together, to which, if living, the parent would have been entitled under the second clause of the will. In other words, that on the death of either of the children of the testator before the appointed period of division of the estate, leaving a child or children, such child or children is substituted to the place of the deceased parent, taking all the rights and benefits to which the parent was entitled. The will does not seem capable of this construction. The second clause of the will is framed and expressed solely to provide for the support and education of the testator's own children, the children designated by name in the first clause, constituting his *family*, for whose benefit the testator's domicile was to be attended to, and managed by his friend Toomer, during the minority of the youngest child. For most purposes, a will is regarded as speaking from the death of the testator. This is particularly true, in reference to gifts to classes or fluctuating bodies of persons; as to children, descendants or next of kin, which are applied to persons answering the description at the death of the testator.—1 Jarman on Wills, 391. The gift in this clause is direct and immediate to the (*my* is the word of the clause) children of the testator—the children he had designated by name in the first clause. The repetition of their names in the clause would not have rendered it clearer than it is now, that it is for their support and education, and for their support and education only, he intended to provide. The gift is not to a class, but to persons designated by name, bearing to the testator the relation of children, and its diversion to other purposes is as unauthorized, as the diversion of a gift to A, from A to B.

The first clause designates not only the time when the limitation over to the child or children of a deceased child shall take effect, but the particular interest such child or children may take. The period at which the limitation over takes effect, is the partition or division of the estate, and the interest is the

[Levy &amp; Co. v. Van Hagen.]

share of the estate the parent would then have taken if living. The parent, if living, would not then have taken, or been entitled to maintenance or education, and the child or children surviving could not take that to which the parent was not entitled. The intention of the testator is manifest, expressed in unambiguous language. His estate is to be kept together during the minority of his youngest child, and during that period, his children whom he designates by names, are to be supported and educated from the rents and income. When the youngest child becomes of age, a division of the estate is to be made, and then, if any child has died leaving a child or children, such child or children, shall on the division, and not before, represent, stand in the place of, and take the share of the deceased parent. This intention is too clear for doubt or argument.

The executors are charged with the duty of maintaining and educating the children. They are not clothed with a power of appointing or disposing of any property to, or among them. Powers were by the common law subjected to a strict construction, and in some instances, the construction was so rigid it approached harshness. It was settled that a power to appoint to *children*, would not authorize an appointment to grandchildren or to lineal descendants of remoter degree than immediate offspring.—4 Kent 345. The statute to which we are referred (Code of 1876, § 2216), works a change of this rule of the common law, and permits the exercise of a power of appointment not restricted to particular children, in favor of grandchildren. The statute can have no application, for the executors are not clothed with a power of appointment, but charged with a duty, and the duty is restricted to particular children, not to a class of persons taking by that denomination. The duty is essentially different from, and has no property or quality in common with a power. We find no error in the record, and the decree of the Court of Probate is affirmed.

## Levy & Co. v. Van Hagen.

### *Claim Suit for Money due on Life Insurance Policy.*

\**Life insurance ; construction of policy.*—A life insurance company, by its policy, after reciting that the advance premium was paid, and the subsequent premiums were to be paid, by Adele F. Van. H., insured the life of Hiram W. Van H., for the sole use and benefit of the said Adele, in a stated amount, for the term of his natural life, or until he attained the age of forty-five years; and promised and agreed “to and with the



[Levy &amp; Co. v. Van Hagen.]

said assured," to pay the sum insured to her or her legal representatives, within ninety days after due notice and proof of the death of the said Hiram W., but further provided, that if the said Hiram W. should live to attain the age of forty-five years, then the sum insured should be paid to him, within ninety days after due notice and proof of his having attained that age. In a suit between Adele F. and an attaching creditor of Hiram W., *held*,

1. That the interest of Adele F. in the policy was contingent upon Hiram W. dying before he attained the age of forty-five years.

2. That the said Hiram W. having lived to attain the age of forty-five years, the money due on the policy was his property, free from any trust in favor of Adele F., and liable to the payment of his debts.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

In this cause the appellants sued out an attachment against Hiram W. Van Hagen, on 2d May, 1879, which was levied by service of a writ of garnishment on the Alabama Gold Life Insurance Company, a corporation, as debtor to the said Van Hagen. On 26th May, 1879, the insurance company answered the garnishment, stating that the said Van Hagen then held a paid up policy of insurance, issued by that company on his life, for \$833.33, which, by its terms, was payable to him, if he should live to attain the age of forty-five years and ninety days, and that the said Van Hagen would attain the age of forty-five years provided he lived until April 22, 1881; but that, if he should die prior to April 22, 1881, the policy was, by its terms, payable to his daughter, Adele F. Van Hagen. It is further stated in the answer, that the policy is subject to the payment of a note made by Hiram W. Van Hagen to the company for the sum of \$191.33, and to the payment, annually, of the interest thereon; and that, if default be made in the payment of the interest, the policy would become null and void.

On 3d June, 1881, the garnishee, by additional answer, suggested that Adele F. Van Hagen claimed the money which would become due on the policy; and on 4th June, 1881, Adele F. Van Hagen, by her next friend, appeared, waived notice, and propounded her claim to the fund in controversy. She averred, that the policy referred to in the answer of the garnishee, was a contract made by her, through her father, Hiram W. Van Hagen, with the insurance company, whereby the company insured the life of Hiram W. for her sole use and benefit, in the amount of twenty-five hundred dollars, for the term of his natural life, or until he attained the age of forty-five years; that the company promised to pay the sum assured to Hiram W., if he should attain the age of forty-five years; but that, "nevertheless said H. W. Van Hagen would, in that event, receive such insurance money for the sole use and benefit of said Adele F. Van Hagen," under the terms of said policy;

[Levy &amp; Co. v. Van Hagen.]

that by an agreement made between Hiram W. and the company, which was endorsed on the policy, the same became a paid up policy for the sum of \$833.33, subject to the payment of the sum of \$191.61. She further averred, that "all premiums and interest due said company have been paid, and that said H. W. Van Hagen has now attained the age of forty-five years, and that said insurance money, amounting to \$641.72, is now payable to said H. W. Van Hagen, for the sole use and benefit of claimant, and not for the use or benefit of himself, the said H. W. Van Hagen." The appellants denied that the money was the property of appellee, and averred that the same was the property of Hiram W. Van Hagen, and should be condemned to the payment of the debt sued on.

Upon the issue thus made the cause was tried. The policy of insurance, with the endorsement thereon, and an agreed state of facts were introduced in evidence, all of which are sufficiently set forth in the opinion.

The court below charged the jury in writing, at the request of the appellee, that, if they believed the evidence, they must find the issue in her favor. To the giving of this charge the appellants excepted, and now assign the same as error.

OVERALL & BESTOR, for appellants.—(1.) The policy has two characters. In favor of Adele, it is an ordinary time policy, payable to her at the death of her father, provided he dies before he attains the age of forty-five years. But as her interest is subject to be defeated by his attaining that age, and to be paid to him on that contingency, it is termed an endowment policy.—Bliss on Life Ins. 2 Ed. p. 6. Hiram W. having attained the age of forty-five years, the contingent interest of Adele is thereby defeated, and the money assured belongs to Hiram W. Van Hagen.—Hine & Nicols' Law of Assignments of Life Policies, 113, and case cited; *Evers v. Life Ass. of America*, 4 Ins. Journal, 593; *Bingham v. Home Life Ins. Co.*, Insurance Monitor, Oct. 1881, 495; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157. (2.) There is no trust estate in the policy in favor of Adele.—*Watson, admr. v. Colburn*, 99 Mass. 342. (3.) The recital of the payment of premiums by Adele does not affect the title to the money insured; for in fact she did not pay them.—Hine & Nicols' work, *supra*, 128.

HERNDON, CROOM & LEWIS, *contra*.—Adele and the Insurance Company are the contracting parties. The first clause of the policy declares, that the company insures the life of Hiram W. for the sole use and benefit of Adele, for the term of his natural life, or until he shall attain the age of forty-five years. On the happening of either event, therefore, the money becomes

[Levy &amp; Co. v. Van Hagen.]

payable *for the sole use and benefit of Adele*. The second clause, stipulating that the payment shall be made to Hiram W., in the event he attain the age of forty-five years, does not change the beneficial ownership, but merely provides *a mode of payment*. He is thereby appointed the agent or trustee to receive the money for her, in the event he attains that age. This construction harmonizes both clauses, and should be adopted.—May on Ins. 182; 1 Wait's Actions and Defenses, p. 122, § 11, and cases cited. If the two clauses are repugnant, the first prevails.—2 Parson on Con. m. p. 26; 1 Wait's Actions and Defenses, p. 123, § 13; Chitty on Con. (11 Ed.) 127.

STONE, J.—The present record presents but a single question, which arises on the construction of the endowment policy taken out on the life of Hiram W. Van Hagen, and copied in the record. The sum due on that policy became payable when the said Hiram W. became forty-five years of age—in the spring of 1881. The policy is so framed, that the sum assured was to be paid at his death, or when he reached the age of forty-five, which ever should first happen. He was living when he became forty-five years of age, and, so far as we are informed, is still living. This suit was commenced in 1879, about two years before the maturity of the policy, and its object was and is, to subject the fund assured to the payment of Hiram W. Van Hagen's debt. The suit was not brought to trial until Van Hagen became forty-five years of age. For appellant it is contended, that when he reached that age, the money was payable to Hiram W. and became his property. Appellee is the daughter of the said Hiram W., and she claims the money as her property. It is admitted as a fact, that when the policy was taken out—in 1869—Adele F., the claimant, was only three or four years old, and that all payments of premiums were made by Hiram W., the father, until this suit was brought in 1879. The payment of the two premiums afterwards made, were by Adele F., the daughter, through her attorney. The record does not show whether Adele F. had, or had not an estate, or means with which to pay the premiums. No question is raised as to the *bona fides* of the transaction, and the inquiry is, who under the policy, and under the facts of this case, is entitled to the money, the father or the daughter. In answering this question, we must endeavor to get at the intention of the parties as expressed in the written policy. The policy recites the amount of annual premium to be paid, and when paid; recites that the advance premium was paid, and the subsequent premium to be paid, by Adele F. Van Hagen, and then stipulates that the Gold Life Insurance Company of Mobile “do assure the life of Hiram W. Van Hagen, of Mobile, in the county of Mobile



[Levy &amp; Co. v. Van Hagen.]

and State of Alabama, for the sole use and benefit of the said Adele F. Van Hagen, in the amount of twenty-five hundred dollars in American gold coin, for the term of his natural life, or until he shall attain the age of forty-five years, commencing on the 28th day of April, 1869, at noon. And the said company do hereby promise and agree, to and with the said assured, her executors, administrators, or guardian of children, if under age, well and truly to pay or cause to be paid, at the City of Mobile, the said sum insured to the said assured, or her legal representatives, within ninety days after due notice and proof of interest (if assigned or held as security), and of the death of said Hiram W. Van Hagen. But if the said Hiram W. Van Hagen shall live to attain the age of forty-five years, then the said sum insured shall be paid to the said Hiram W. Van Hagen, within ninety days after due notice and proof of the said Hiram W. Van Hagen having attained the age of forty-five years."

Counsel on each side of this controversy confess they have been unable to find any adjudged case precisely like the present. In a small publication, entitled "Law of Assignments of Life Policies," by Hine & Nichols, published in 1881, on page 114, is the following language: "In *Tenness v. N. W. Mut. Life Ins. Co.*, 9 Ins. Law Journal, 191, the insurance was on the life of the husband, 'for the sole use and benefit' of the wife, 'for the term of ten years,' and the company promised to pay the amount to the person whose life was insured or assigns in ten years, or, in case of his previous death, to pay the beneficiary or assigns. It was held by the Supreme Court of Wisconsin, in 1879, that so far as the life insurance part of the contract was concerned, it was an insurance of the husband for his own benefit, but, in case of his previous death, the wife would be entitled to the endowment. The husband surviving the term, she had no claim on the fund." We have carefully examined the Wisconsin reports, extending over a period of six years, and including the year 1881, and find no mention made of the case referred to above. That case, if correctly reported, is somewhat different from this, in the collocation of the clauses of the policy. So this case comes at last to the inquiry, what is the proper interpretation of the policy? What did the parties intend, as shown by the language employed? The Circuit Court, after much deliberation, reached the conclusion, that the claimant, the daughter, was entitled to the money.

We feel constrained to differ with the Circuit Court. By the very terms of the policy, the payment of the money to the daughter was made contingent on notice and proof of the death of said Hiram W. Van Hagen. Being in life, and reaching

[Bromberg Bros. v. Heyer Bros.]

the age of forty-five, this proof could not be made, for no such fact existed to be proved. On the other hand, Hiram W. Van Hagen was entitled to receive the money, for *he did live to attain the age of forty-five years*. Due proof could have been made of that fact, and doubtless would have been made; but it was admitted, and proof of it thereby dispensed with. This makes the precise case, upon the occurrence of which the policy declares *the said sum insured shall be paid to the said Hiram W. Van Hagen*. Many reasons may be supposed, why Mr. Van Hagen should have wished the money paid to his daughter, if she should be left an orphan during her tender years, which would not apply, if he survived that period. We deem it unnecessary to enumerate them. Sufficient for us, that the precise event has happened, upon which the policy stipulates the loss or endowment should be paid to him. There is neither expression nor implication in the policy, that he should receive it charged with a trust.

Reversed and remanded.

## Bromberg Bros. v. Heyer Bros.

*Bill in Equity to set aside as Fraudulent and Void Bill of Sale of Stock of Goods.*

1. *Demurrer to bill in equity; must be based upon matter apparent on face of bill.*—A demurrer to a bill in equity must be based upon matters apparent on the face of the bill, and can not be supported by any new fact or foreign matter alleged by the defendant. Therefore, if a written instrument is not correctly set out in the bill, the variance between it and the original is not available on demurrer.

2. *Simple contract creditors; provisions of §§ 3886 and 2126 of the Code may be enforced by them.*—Section 3886 of the Code confers on simple contract creditors without liens, the remedy which was formerly accorded only to judgment creditors, of filing a bill to set aside a conveyance or sale made with intent to hinder, delay or defraud creditors. Such creditors also have the right to assail, by bill in equity, a general assignment for the purpose of claiming the benefit of section 2126 of the Code.

3. *Disclaimer by defendant to bill; when not allowable.*—A proper or necessary party to a bill in equity can not, by a disclaimer, avoid his liability under the bill; and a motion to be discharged made by such defendant and based on such disclaimer, should be overruled.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in this case was filed by Heyer Bros., "on behalf of themselves and such other creditors standing in the same posi-

[Bromberg Bros. v. Heyer Bros.]

tion as complainants," against Ernest Bromberg and Charles L. Bromberg, late partners trading under the firm name of Bromberg Bros., and against Frederick Bromberg, seeking, in one aspect of the bill, to have set aside as fraudulent and void a bill of sale of a stock of goods made by Bromberg Bros. to Frederick Bromberg, and an account; and claiming on behalf of themselves and such other creditors as stand in the same position, and as against Frederick Bromberg, a preference to the property conveyed, under and by virtue of an agreement alleged to have been made by the defendants with complainants and other creditors; and seeking, in another aspect, in the event that they are mistaken in their claim of preference under said agreement, that said bill of sale may be declared a general assignment, on the ground that substantially all the property of Bromberg Bros. is thereby conveyed. The complainants, as the bill alleges, being simple contract creditors of Bromberg Bros., on the 20th June, 1876, agreed with them to extend, and did extend, the debt which said firm owed complainants, on the faith of an agreement in writing made by the said Frederick Bromberg, who was the father and also a large creditor of the said Bromberg Bros., "in which he agreed, that if the other creditors would grant the extension desired, they should have the preference and priority over his claim against the firm of Bromberg Bros., and that he, Frederick Bromberg, would waive and postpone the payment of his claim and debt until all the debts which should be extended should be fully paid." The agreement is not made an exhibit and its effect is thus stated. Afterwards Bromberg Bros. executed to Frederick Bromberg the bill of sale which is the subject of this controversy, and the bill is filed for the purpose above stated. The questions decided do not render it necessary to give a more detailed statement of the averments of the bill. Frederick Bromberg demurred to the bill, assigning five grounds of demurrer. The first, second, third and fifth grounds are based upon the said agreement alleged in the bill to have been made by him with complainants, not, however, as it was pleaded in the bill, but as it was averred to be in the demurrer. The fourth ground of demurrer is that "the bill is without equity, because the bill shows, that defendant is a *bona fide* creditor of the said Bromberg Bros. and is in the possession of their stock etc., in part payment of his debt, and does not show that complainants have any lien upon" said stock. Charles L. Bromberg answered the bill, and incorporated in his answer a disclaimer of "all right, title or interest in the firm of Bromberg Brothers and in the event of this suit," and moved the court to discharge him upon his disclaimer. The Chancery Court rendered a decree overruling the demurrer of Frederick Bromberg and also over-



[Bromberg Bros. v. Heyer Bros.]

ruling the motion of Charles L. Bromberg; and this decree is here assigned as error.

FREDERICK G. BROMBERG, for appellant.  
JNO. T. TAYLOR, *contra*.

SOMERVILLE, J.—The several grounds of demurrer interposed by the appellants to the bill in this case were properly overruled by the chancellor. The first, second, third and fifth causes were mere “*speaking* demurrers,” based on the averred contents of a writing or document entirely variant from the allegations of the bill. A demurrer must be based upon matter apparent on the face of the bill, and cannot be supported by any new fact or foreign matter alleged by the defendant.—Story’s Eq. Plead. §§ 447–452. The doctrine of craving *oyer* of written instruments, and of demurring if a material variance appears between the *oyer* and declaration, has always been a practice confined to courts of law, and has never prevailed in courts of equity. It was also confined to the instrument upon which the suit was brought.

The fourth cause of demurrer was equally untenable. It may be that the bill was multifarious, as being filed in a double aspect and embracing alternate averments which are inconsistent and repugnant.—*Lehman et al. v. Meyer et al.* 67 Ala. 396. But it was not demurred to on this ground. And whether we consider it as a creditor’s bill filed *to set aside a sale as fraudulent*, or to *declare it a general assignment*, it could be filed by a simple contract creditor without a lien. Section 3886 of the present Code (1876) confers on such creditors the remedy, which was formerly accorded only to judgment creditors, of filing a bill to set aside a conveyance or sale made with intent to hinder, delay or defraud creditors.—*Reynolds v. Welch*, 47 Ala. 200; *Evans v. Welch*, 63 Ala. 250. And it is too manifest for argument, that a creditor without a lien may assail a general assignment with the view of claiming the benefit of section 2126 of the Code, which provides that such a conveyance shall “enure to the benefit of *all the creditors* of the grantor equally.”

There is no error in the action of the chancellor refusing to discharge Charles L. Bromberg on his *disclaimer*. A party can not in this manner get rid of his liability to answer a suit, where the statements of the bill show him to be a proper or necessary party. The bill here avers a fraudulent transfer as being made by Bromberg Bros., of which firm Charles L. was a member, and both members of the partnership are alleged to be liable for the debt due complainant. Their conduct, furthermore, requires investigation, and the judgment of the court vitally affects their interests. The disclaimant was a necessary

[Describes v. Wilmer.]

party to this suit, and should not have been discharged. His motion was properly overruled.—Bump on Fraud. Convey. 534; *Gaylords v. Kelsaw*, 1 Wall. 81; Story's Eq. Plead. § 840.

The decree of the chancellor is affirmed.

## Describes v. Wilmer.

### *Application to Probate Court for Appointment of Guardian for Minors.*

1. *Testamentary appointment of guardian; when instrument effectual as.*—An instrument to be effectual as a testamentary appointment of a guardian for minors, must show who is to have the care and nurture of such minors, although the word “guardian” need not be employed.

2. *Same; when instrument does not operate as.*—An instrument executed by a father of two minor children, reciting that he was lying in danger of death, and that he had “found kind friends to take charge [of] and raise” his children, and requesting the managers of an asylum, in whose custody the children then were, to place them “in the custody of” a party therein named, shows that it was not the father's intention for such party to have the care, protection and nurture of such children; and such instrument can not, therefore, be construed as a testamentary appointment of such party as guardian of said children.

3. *An instrument testamentary in its character must be probated.*—An instrument testamentary in its character can not be recognized as valid in any form, until it has been admitted to probate.

4. *Appointment of guardian; when erroneous.*—A probate judge has no authority to appoint a guardian for minors, for the purpose of having them sent into a foreign country; and an appointment made upon an application, which shows that such is the purpose for which it was sought, is improvident and erroneous, and should be revoked.

5. *Judgments; power of court over, during term at which rendered.*—The judgments of courts are in the breast of the judge, until the final adjournment of the term, and they may be set aside or modified at any time during the term at which they were rendered; and, unless the court in such order violate some rule of law, or pronounce a judgment the law will condemn, it is not error that such ruling was made without notice to the opposite party.

6. *Revocation of letters of guardianship; when notice unnecessary.*—An order revoking an erroneous and improvident appointment of guardian for minors, made during the same term at which the appointment was made, but on a different day of the term, is free from error, although it was made without notice to the party whose letters were thereby revoked.

### APPEAL from Mobile Circuit Court.

(Name of the presiding judge not disclosed by the record.)

Charles Corege died in Mobile, in this State, in October, 1880, leaving two children, both of whom were then under twelve years of age, and whom their mother, the wife of Corege, had

[Desribes v. Wilmer.]

abandoned in their lifetime. The proceedings in this cause originated in an application made by Joseph Desribes, the appellant, to the Probate Court of Mobile County, to be appointed the guardian of said children. On final hearing the court entered a decree refusing to appoint him, and from this decree he appealed to the Circuit Court of said county. The Circuit Court affirmed the decree of the Probate Court, and from this judgment of affirmance, Joseph Desribes appealed to this court, and here assigned the same as error. The proceedings had in the Probate Court are sufficiently set out in the opinion.

HENRY ST. PAUL, H. C. SEMPLE and D. S. TROY, for appellant.

P. HAMILTON and JAMES BOND, *contra*.

STONE, J.—We enter upon the discussion of the questions raised by this record with deep feelings of regret; regret, that the case has been brought before us, and deeper regret that any occasion should have arisen for its presentation. It is history, that differences in religious faith and creed have given rise to the most inveterate and sanguinary quarrels the world has witnessed. “Vengeance is mine,” is the language of inspiration, but mistaken duty and misdirected zeal have often prompted the fanatical to usurp this divine authority. Religious quarrels or persecutions find no warrant, or even palliating excuse, in our constitutions and jurisprudence. All religions, save such as shock the public morals, or offend our statutes, are alike tolerated and protected by the broad philanthropy of our republican policy. Our theory is to “render unto Cæsar the things that are Cæsar’s, and unto God the things that are God’s.” We disturb no man’s faith, unless it is made manifest in acts which violate municipal regulation. We deal with the physical and secular, and not with the mere moral which is not uttered in voice or act, offensive to our legislative policy. We have indulged in these general reflections, for the purpose of making more emphatic the declaration, that what may be considered the religious aspects of the present contention, can receive no consideration at our hands. We must deal with the case upon its dry legal bearings, as if it presented no question of religious differences; in other words, as if the rival claimants were of one religious faith. We are but a tribunal for the enforcement of municipal law, one of whose fundamental maxims is, “that no preference shall be given by law to any religious sect, society, denomination or mode of worship; . . . that no religious test shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges and



[Describes v. Wilmer.]

capacities of any citizen shall not be in any manner affected by his religious principles.”—Declaration of Rights, § 4.

Moral and theological problems are often of most difficult solution. The broadest philosophy is unconsciously warped by one's own creed. We say one's own, because by adopting it, we furnish the highest evidence that our conscience approves it. Yet, another, having equal advantages and equal intelligence, will condemn it as sincerely as we advocate it. Who is right, and who shall judge between us? This precise liberty of conscience—this right to differ with our fellow-men—our constitution not only tolerates, but guarantees to every man. Hence it is, that questions of polemic theology can never obtain a standing in our courts of judicature. Hence it is, that the religious aspects of this case must be entirely ignored by us.

What we have said above has been prompted in part by the fervid language of the counsel of appellant. What are claimed as “the still more precious rights of conscience,” the baptism “in the church to which he [Chas. Corege] on his death-bed acknowledged spiritual allegiance,” the assertion that “the main issue raised, is as to the religious training of the children”; these and many other similar expressions, we must confess, we find no warrant for in the record; and, we again say, in the form here presented, they can exert no influence in our deliberations. It is our purpose to censure no one, while at the same time, we feel it our duty to dis sever the contention from all supposed sectarian bearings. Viewed from a legal standpoint, they can not be factors in our deliberations.

There is a social aspect of this question, upon which we feel authorized to express an opinion. We do not doubt the Church Home is a well founded and well governed asylum for the orphan and the destitute. We do not doubt that the children, over whom the present controversy arose, are as well and tenderly cared for, as they could be in any institution of eleemosynary foundation. We do not doubt their moral, religious, industrial and social training will be excellent. We do not doubt all will be well with them, during their stay in the Home. How will it be when the time comes for them to leave the asylum, and enter upon the battle of life? Just entering upon womanhood, penniless, in a land where they can claim no blood relationship, who shall bear up such frail things amid rude and unsympathizing surroundings? Contrast with this picture the home and environments of an honorable and respected ancestry, the feeling of loyal attachment for an ancient family which descends from sire to son, and above all the sympathy and sustaining force which blood relationship always feels and exerts, and who could hesitate in choosing, when religious predilection is kept out of view? For myself, I think it would have been

[Desribes v. Wilmer.]

better for the children, all things considered, if they had been restored to their "kinsmen according to the flesh." But the social bearings of the question are not for us. In the primary court, other things being substantially equal, we will not say that moral and social bearings and surroundings should be overlooked, in making the selection.

In the selection of a guardian, the interest, safety and well-being of the infant ward, are matters of prime, paramount consideration.—*Lee v. Lee*, 67 Ala. 406. Infants—particularly doubly orphaned, destitute infants—are, or should be wards of society, if not of government. Their protection and proper training are alike the instinct and mandate of an enlightened humanity. No sordid greed of lucre, no unchastened spirit of propagandism, should shade or pollute its benevolent purposes. The best attainable good of the infant should be the great, dominating principle; not the provisional benefit, but the lasting good.

How does the present case stand on questions of dry law? It is contended for appellant, that he is entitled to the guardianship of the children, because Charles Corege, the father, appointed him to be such. Testamentary guardianship was created in England by statute, 12 Charles II, and consequently was unknown to the common law.—1 Black. Com. 462; Schoul. Dom. Rel. 393. Section 2751 of the Code of 1876 provides, that "guardians may be appointed by the last will and testament of the father, if the right is claimed within six months after the will is admitted to probate." The paper relied on as conferring the right to guardianship in the present case, is in the following language: "State of Alabama, Mobile City. With grateful acknowledgment of the kindness to my two minor children, named Louise Adele Corege, 10 years old, and Emma Heloise Corege, 9 years old, by the managers of the Protestant Orphan Asylum, but being myself lying in danger of death at the City Hospital in this city, and having found kind friends to take charge and raise my said children, I respectfully request the managers of the Protestant Orphan Asylum of this city to place my said children in the custody of Rev. Father Joseph Desribes of this place. In witness whereof, I have hereunto set my hand at Mobile, Oct. 5, 1880. [Signed] Chas. Corege."

This instrument had two subscribing witnesses, and on the same day, a notary public of Mobile certified to its acknowledgment before him, adopting the form prescribed for the acknowledgment of deeds.—§ 2158 of the Code of 1876. It was not probated as a will. There are two unanswerable objections to the position here assumed. An instrument testamentary in its character can not be recognized as valid in any form, until

[Desribes v. Wilmer.]

it has been admitted to probate.—2 Brick. Dig. 532, § 105. But if probated, this instrument can not be construed as appointing Rev. Joseph Desribes to be guardian. It not only fails to indicate that he was to have the care, protection and nurture of the children, but, by clear implication, shows the contrary. Unnamed kind friends were to take care of, and raise the children. The instrument, to be effectual as a testamentary appointment, must show who is to have their care and nurture, but the word guardian need not be employed.—*Gaines v. Spann*, 2 Brock. 81; *Wardwell v. Wardwell*, 9 Allen, 518; *Corrigan v. Kiernan*, 1 Bradf. Sur. 208; *Miller v. Harris*, 14 Sim. 540.

It is further contended for appellant, that the Probate Court appointed him guardian, rightfully so appointed him, and had no authority under the circumstances to revoke the appointment. The application for the appointment was made by appellant, March 5th, 1881. The principal ground on which the appointment was claimed, was the writing signed Charles Corege, copied above. The court thereupon made an order, setting the case for hearing on the 17th March. On the 17th March, the court made this order:

“State of Alabama,        } Probate Court of said County, March  
Mobile County.        } 17, 1881.

Louise A. Corege, Emma H. Corege, minors. In matter of guardianship:

It is ordered, that the consideration of the application for letters of guardianship over the persons and estates of said minors be continued to the 30th inst.

P. Williams, Jr. Judge.

No reason is shown anywhere in the record why this order of continuance was made.

On the next day, March 18, an *ex parte* application was made to the probate judge to make the appointment, and he proceeded to make it. The reasons urged for the haste, were, that it was desired and intended to send the children immediately to their paternal aunt in France, who had agreed to receive and care for them, that the Vice Consul of France, resident at Mobile, would provide them passage on a French vessel then lying in port, that said vessel was then receiving its freight for the return voyage, and the consequent danger of losing this favorable opportunity of restoring the children to their father's relations. On the 30th March, Rev. R. H. Wilmer, rector of the Church Home, having the custody of the children, appeared and petitioned the Probate Court to revoke the letters of guardianship granted to Rev. Joseph Desribes, as improvidently granted; setting forth that he had had no notice of the application, that he had been absent on clerical duties, that the children had been placed in the Home with the written consent and appro-



[Desribes v. Wilmer.]

bation of their father, and he claimed their rightful custody. Thereupon the Probate Court, without notice to the appellant, made an order setting aside his appointment as guardian, and ordering that the further hearing of said application be set down for 6th day of April.

The record in this case leaves it somewhat obscure as to the day on which the further hearing of said application was had. The day appointed for such hearing, as we have seen, was April 6th. This was Wednesday, five days before the regular April term of the court, which occurred on the 11th, the second Monday. The final order made in the cause begins as follows: "This being the day to which the hearing of the petition of Rev. Joseph Desribes for letters of guardianship of the persons of said infants [Louise Adele and Emma Heloise Corege] had been postponed" etc. This order is dated in the caption, "Probate Court, April 16th, 1881." This was Saturday, and there is no order in the record postponing it to that day. In the bond for appeal from the Probate to the Circuit Court, it is recited that the decree appealed from was rendered on the 11th April. This could not have been true, if the trial was entered upon on the 16th. On the other hand, this recital is very reasonable, if the trial was begun on the 6th, the day appointed; for there was a good deal of testimony, and doubtless a great deal of feeling in the cause; and a delay of the decision for five days, until the 11th, would not be unusual. We therefore infer, that the trial was commenced on the 6th and protracted to the 11th; and that the date in the transcript—April 16—is an error of the copyist. A further reason for this construction: In the final order it is said, the 18th day of March—the day on which the order was made appointing Rev. Joseph Desribes guardian—was "a day of this term of this court." This could be true, if this final hearing was begun and had on the 6th, or at any time before the 11th. A term of the Probate Court can be kept open by adjournments or continuances, up to the last judicial day before the next succeeding term. The second Monday in March, 1881, was the 14th day of the month. On that day the March [regular] term of the Probate Court commenced. It could be kept open until Saturday, the 9th day of April, the last judicial day before the second Monday, 11th day of April. The conclusion we reach is, that the trial was commenced on the 6th, a day to which the March term was adjourned, progressed with, and that on the 11th the decree, (possibly held up for deliberation,) was pronounced. This harmonizes all the averments and recitals in the record, except the single one of the date, April 16, which we conclude must be a mistake.

"Guardians must be appointed for minors under the age of

[Describes v. Wilmer.]

twenty-one years, by the judge of probate of the county in which such minor resides."—Code of 1876, § 2748. The domicile of the father at the time of his death, is the domicile of his infant child. No one, not even the mother of such child, can, of his or her mere volition, change the inherited domicile of such child.—*Johnson v. Copeland*, 35 Ala. 521. We have hinted above at the duties the guardian owes to the ward. To the person of the ward he is placed in *loco parentis*. Protection, nurture, and a proper care of the moral training of the infant are among the duties the law casts upon him. If the infant ward own property, the law casts other duties on the guardian, not necessary to be here noticed. Now, all these statutory provisions, and the whole theory on which guardians are appointed under our laws, proceed on the postulate, that the relation is to be kept up, and the ward retained within the jurisdiction in which the guardian is appointed. True, a guardianship once rightfully taken out may be removed to another State; but to this end, certain statutory regulations must be strictly followed.—Code of 1876, §§ 2796, 2800; *Lary v. Craig*, 30 Ala. 631. The statutes make no provision for such removal to a foreign country. But we need not pursue this inquiry, as the present record raises no such question.

The appointment of appellant, as we have seen, was made March 18. It was shown in the application to the probate judge, that the object for which the appointment was sought, was not that the applicant should become and continue guardian of the infants in the county of Mobile, or in the State of Alabama. The avowed, express purpose was to send them immediately to a foreign country. The probate judge had no authority to appoint a guardian for such purpose, and he consequently erred in making the appointment. It was his duty to revoke such improvident appointment, and he did not err in doing so.—*Jones v. Brooks*, 30 Ala. 588. The order of revocation being granted during the same term at which the appointment was made, although on a different day, no question of notice can arise. The judgments of courts are in the breast of the judge until the final adjournment of the term, and may be set aside or modified during the term; and unless the court in such order violate some rule of law, or pronounce a judgment the law will condemn, it is no error that such ruling was made without notice to the opposite party. An order improperly granted, should be set aside, if the error be discovered during the term; and, if necessary, we would presume counsel continued present in the court, until the order of revocation was passed. We might present other arguments in vindication of the ruling in the court below, but deem them unnecessary.

Affirmed.

[Posey v. Beale.]

**Posey v. Beale.***Motion to amend Bill of Exceptions.*

1. *Bill of exceptions ; when can not be altered or modified.*—A bill of exceptions having been signed by the presiding judge, becomes a part of the record in the cause to which it appertains, and can not subsequently be changed by oral evidence, unless the proposed change or modification is made prior to adjournment, while the matter is *in fieri*; or within the time agreed on by counsel in writing, authorizing such bill to be signed, pursuant to § 3113 of the Code of 1876.

2. *Bill of exceptions ; proper practice in obtaining.*—The proper practice for a party desiring a true bill of exceptions to pursue, is for him to prepare a correct bill, in which the point or decision sought to be reviewed and the facts of the case are truly stated, and to tender it, within the proper time, to the presiding judge for his signature, requesting him to sign or refuse to sign it as prepared. If he fail or refuse, an application can then be made to this court to establish the bill of exceptions upon such evidence as may be deemed satisfactory.

APPEAL from Conecuh Circuit Court.  
Tried before Hon. JOHN P. HUBBARD.

J. POSEY, *pro se*.

G. R. FARNHAM, *contra*.

SOMERVILLE, J.—This is an appeal from the action of the circuit judge refusing to amend a bill of exceptions. The bill was signed, by agreement of counsel reduced to writing, within thirty days after the adjournment of the spring term of the Circuit Court, 1881, at which the cause was tried. The motion to amend and correct the bill was made at the ensuing fall term of the court, and was based on *ex parte* affidavits and the oral testimony of witnesses which were proposed to be introduced for this purpose by the appellant. The circuit judge refused to receive both the affidavits and the oral evidence, and overruled the motion.

We are of opinion that there was no error in this action of the court. The principle is settled in this court, that, after a presiding judge has performed the duty of signing a bill of exceptions, and the court has adjourned for the term, it is beyond his power, to alter or modify it. It becomes a part of the record in the cause to which it appertains, and can not subsequently be changed by oral evidence, unless the proposed change or modification is made prior to adjournment, while the matter is *in fieri*, or within the period of time agreed on by counsel in writing, authorizing such signing to be perfected, after adjourn-



[Wilkinson v. May.]

ment, pursuant to section 3113 of the Code of 1876.—*Chapman v. Holding*, 54 Ala. 61; *Branch Bank v. Kinsy*, 5 Ala. 9; *Weir v. Hoss*, 6 Ala. 881.

The proper practice in such cases would be for the party aggrieved to prepare a correct bill of exceptions, in which the point or decision sought to be reviewed and the facts of the case are truly stated, and to *tender it within proper time* to the presiding judge for his signature, requesting him to sign or refuse to sign it as prepared. If he fail or refuse, an application can then be made to this court to establish the bill of exceptions upon such evidence as may be deemed satisfactory.—Code, 1876, § 3111; *Garlington v. Jones*, 37 Ala. 240; *Strawbridge v. The State*, 48 Ala. 308.

Affirmed.

## Wilkinson v. May.

### *Bill in Equity to Enforce Vendor's Lien on Land for Unpaid Purchase Money.*

1. *Vendor's lien for unpaid purchase money; when it exists, and against whom enforceable.*—A vendor of lands, who has not taken security, although he makes an absolute conveyance, with a formal acknowledgment that the consideration is fully paid, retains an equitable lien for the payment of the purchase money, which will be enforced against the vendee and all persons claiming under him, other than *bona fide* purchasers without notice.

2. *Vendor's lien; party disputing must show it has been displaced or waived.*—Such lien, not being dependent upon a specific agreement for its creation, but existing independently thereof, and resting on the broad principle of equity, that one man ought not, in good conscience, to get and keep the estate of another without paying the consideration money, whoever resists the enforcement of the lien assumes the burden of proving that “it has been intentionally displaced or waived by the consent of parties; and if, under all the circumstances, it remains in doubt, then the lien attaches.”

3. *Same; passes by an unqualified assignment of the purchase money.* A vendor's lien for unpaid purchase money is, in its very nature, assignable; and as an incident to the debt, it passes with an unqualified assignment or transfer of the note or other evidence of debt given for the purchase money.

4. *Same; what constitutes an assignment of.*—Where a husband sold a tract of land and caused the note given for an unpaid balance of the purchase money to be made payable to his wife, which he delivered to her either as a gift, or as compensation for her relinquishment of dower in other lands which the husband had sold, an irrevocable appropriation or assignment of the unpaid purchase money was thereby made, requiring no other act on the part of the husband to give it full effect; and with

## [Wilkinson v. May.]

such assignment of the purchase money, the lien securing the same also passed.

5. *Bill to enforce vendor's lien; who proper parties.*—Neither the personal representative nor the heirs of the deceased husband are proper parties to a bill filed by the wife to enforce a vendor's lien on lands, which was assigned to her by the husband with the unpaid purchase money, they having no right or interest in the subject matter of the suit.

6. *Under deed declaring naked trusts, no estate or interest passes to the trustee.*—Under the statute abolishing naked or dry trusts (Code of 1876, § 2185), the legal and equitable estates, which a conveyance to a naked trustee would have created at common law, are directly and immediately merged in the *cestui que trust*, and no interest or estate passes thereunder to the trustee.

7. *Bill in equity; what constitutes one a necessary party.*—To constitute one a necessary or indispensable party to a bill, in whose absence the court will not proceed to a final decree, he must have a material interest in the issue, which will be necessarily affected by the decree.

8. *Bill to enforce vendor's lien; when original purchaser not a necessary party.*—The original purchaser of land is not a necessary or indispensable party to a bill filed to enforce a vendor's lien thereon for the unpaid purchase money, when it is shown that he had parted with all interest in the land, and his vendee had succeeded thereto.

### APPEAL from Butler Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed by Eliza A. May against W. W. Wilkinson, to enforce a vendor's lien on land for an unpaid balance of purchase money. The case made by the bill is substantially as follows: On 2d May, 1868, Seth S. May, who was the husband of complainant, but who had died prior to the filing of the bill, being seized and possessed of a lot of land in Greenville, in this State, sold it to William Miller and Jane M. Withers, and on the same day he and the complainant executed a deed conveying the lot to Benjamin Porter, as trustee for said purchasers. The deed is made an exhibit to the bill, and under its terms, Porter was a mere naked trustee of the legal title. The price agreed to be paid for the lot was \$1,800, a part of which was paid by Miller on the day of the purchase, and for the balance, \$950.39, he executed his note payable to complainant on demand. The bill then avers, that "said Seth S. May gave to oratrix the money due on said note, and ordered the note made payable to her in consideration of oratrix signing some other deeds to lands;" that the note was still due and unpaid; that Wilkinson was the owner of the lot so sold by the husband, and was in possession thereof; that he obtained possession and ownership from William Miller and Jane M. Withers, or from some one to whom they had sold the same; and that he had notice of complainant's lien and of the facts upon which it rested, before he paid for the lot under his purchase.

Wilkinson, the only defendant, demurred to the bill, assigning, in substance, as grounds of demurrer, that it appeared from

[Wilkinson v. May.]

the bill as follows: 1. That Seth S. May, the vendor of the lands, took no note for the unpaid purchase money, and that he did not transfer or assign any note taken therefor to the complainant; 2. That no vendor's lien was retained for the unpaid purchase money either in favor of Seth S. May or complainant; 3. That William Miller and Jane M. Withers are necessary parties; 4. That Seth S. May conveyed said lot to Porter as trustee, and it fails to show what had been done with, or in relation to said trusteeship, or whether the fee of said lot was still in said trustee, or that Wilkinson claims title under said trustee; 5. That May was dead, but fails to show whether he died intestate, or whether there was an administrator of his estate, or whether the complainant was the sole heir or legatee. The Chancery Court entered a decree overruling the demurrer; and this decree is here assigned as error.

J. C. RICHARDSON and GAMBLE & PADGETT, for appellant.—(1.) It is the settled doctrine of this State, that a vendor of land, who has made a conveyance to the vendee, and a part of the purchase money is unpaid, has a lien on the lands conveyed for the unpaid purchase money, unless there is something in the contract which repels the idea that a lien was intended to be retained. But this lien is personal to the vendor; the creature of equity, not of contract, and can not pass from the vendor without involving him in liability for its ultimate payment. And being a lien on land, it can not be created or passed to another by mere oral agreement—*Flinn v. Barber*, 61 Ala. 530; *Barnett v. Riser's Ex'rs*, 63 Ala. 347; *Bankhead v. Owen*, 60 Ala. 457; *Woodward v. Echols*, 58 Ala. 665; *Hightower v. Rigsby*, 56 Ala. 126; *Hause v. Hause*, 57 Ala. 262; 2 Wash. Real Prop. 507; *Moore v. Holcombe*, 3 Leigh, 597. The term lien in equity is used to denote a charge on property as a security for the payment of a debt, giving neither possession nor right of possession.—*Donald v. Hewitt*, 33 Ala. 534; *Peck v. Jenness*, 7 How. (U. S.) 920; 1 Story's Eq. Jur. § 506. (2.) Such lien is a personal privilege of the vendor, growing out of the relationship of vendor and vendee; and if such relationship be altered or relinquished, the lien will be destroyed. It is a substantive right, distinct and separate from the debt, united alone in the vendor, or where the vendor and transferee are linked together by the vendor being ultimately bound or liable for the debt to the transferee.—Authorities *supra*; 1 Bland's Chan. 523-4; *Mackreath v. Symmons*, 15 Ves. 329; *Wellborn v. Williams*, 9 Ga. 86; *Williams v. Young*, 21 Cal. 227; *Brush v. Kinsley*, 14 Ohio, 20; *Green v. Demoss*, 10 Hump. 371; *Shall v. Biscoe*, 18 Ark. 142; *White v. Williams*, 1 Paige, 502; *Ross v. Heintzen*, 36 Cal. 321; *Jackman v. Hal-*



[Wilkinson v. May.]

*lock*, 1 Ohio, 147; *Briggs v. Hill*, 6 How. (Miss.) 362; *Gilman v. Brown*, 1 Mason, 221.

WHITEHEAD & STALLINGS, *contra*.—(1.) A vendor holding the legal title does not lose his lien by stipulating that the price shall be paid to a third party, and notes given therefor are a lien upon the land.—*Hamilton v. Gilbert*, 2 Heisk. (Tenn.) 680; *Gault v. Trumbo*, 17 B. Mon. (Ky.) 682. In this case the vendor did not obtain benefit of payment by having note made payable to his wife. It therefore does not come within the reason assigned in *Hightower v. Riggsby*, 56 Ala. 126, why a transfer without endorsement does not convey the lien. (2.) It is well settled, that the vendor of land, in the absence of an agreement to the contrary, retains a lien on the land for the unpaid purchase money.—*Shorter v. Frazer*, 64 Ala. 74; *Foster v. Trustees et al.*, 3 Ala. 302; *Burns v. Taylor*, 23 Ala. 255; *Christian v. Austin*, 36 Tex. 540; *Selby v. Stanley*, 4 Minn. 65. Whether there was an intention to abandon this lien is a question of fact, to be gathered from the evidence and nature of the transaction. *Griggsby v. Hair*, 25 Ala. 327; *Hall's Ex'rs v. Click*, 5 Ala. 363; *Conner v. Banks*, 18 Ala. 42. (3.) Wm. Miller and Jane M. Withers were not necessary parties.—*Batre v. Auze*, 5 Ala. 173. (4.) Porter was a mere naked trustee, and, under the statute, he took no interest or title in the property.—*You v. Flinn*, 34 Ala. 409; *Tindal v. Drake*, 51 Ala. 574.

BRICKELL, C. J.—The doctrine of the English court of chancery in its general statement, that the vendor of lands who had not taken security, although he makes an absolute conveyance with a formal acknowledgment, that the consideration is fully paid, retains an equitable lien for the payment of the purchase money, which will be enforced against the vendee, and all persons claiming under him, other than *bona fide* purchasers without notice, has always prevailed in this State. The lien is not dependent upon a specific agreement for its creation—it exists independent of such agreement, upon a broad principle of equity, that one man ought not, in good conscience, to get and keep the estate of another, without paying the consideration money. Resting upon this principle, whoever resists the enforcement of the lien assumes the burden of proving, that “it has been intentionally displaced or waived by the consent of parties. If under all the circumstances it remains in doubt, then the lien attaches.”—*Simpson v. McAllister*, 56 Ala. 228; 2 Story's Eq. §§ 1219–24.

The lien is intended for the security of the vendor, and is preserved and enforced for his benefit and protection. As an incident, it passes to an assignee of the debt, if necessary to

[Wilkinson v. May.]

protect the vendor from ultimate liability to the assignee. But when (prior to the recent statute—Pamph. Acts, 1878–9, p. 171,) the transfer of the note for the purchase money is made without recourse on the vendor; when he is freed from all liability for its payment, the lien not being necessary for his protection, does not pass to the assignee.—*Hall v. Click*, 5 Ala. 363; *Hightower v. Rigsby*, 56 Ala. 126; *Bankhead v. Owen*, 60 Ala. 457. That is not, as is argued by counsel, the question this case involves. The sale of the lands resulted in an obligation upon the purchaser to pay the vendor a specific sum of money, and instead of requiring the note to be made payable to himself, he caused it to be made payable to his wife, intending it partially as a gift, and partially as compensation for the relinquishment of dower in other lands he had sold and conveyed.

When the transfer of a note or other evidence of debt, given for the purchase money, is of a nature that involves the vendor in liability to the transferee for the payment of the debt, it is upon a principle of subrogation to the security the lien affords the vendor for the debt, that the transferee can enforce the lien. When the liability of the vendor does not exist, the medium of subrogation fails. The theory underlying the whole doctrine of the lien of a vendor for the purchase money of lands, is, that to the extent of the lien, the vendee, his heirs or devisees, and all persons claiming under him with notice, are trustees of the land for the vendor. In its very nature the lien is assignable, and, as we have seen before, passes with an unqualified transfer of the note or other evidence of debt, given for the purchase money. When the husband, instead of taking the note for the purchase money payable to himself, caused it to be made payable to the wife, and delivered it to her, though it may have been a mere gift, there was an irrevocable appropriation or assignment of the purchase money to the wife. No further or other act on the part of the husband was necessary to give full effect to the appropriation. The vendee became a trustee of the land, not for the husband, but for the wife, to whom he owed the duty of paying the purchase money.

Though not made the cause of demurrer, if a bill is defective for the want of necessary parties, on the hearing the chancellor must, *ex mero motu*, notice the defect, and cause the bill to be amended, or, if the complainant declines to amend, dismiss without prejudice.—*Goodman v. Benham*, 16 Ala. 625. And the absence of necessary parties is a matter of which this court will, *ex mero motu*, take notice.—*Prout v. Hoge*, 57 Ala. 28; *Dooley v. Villalonga*, 61 Ala. 129.

The present bill is not, however, objectionable because of the omission of necessary parties, though it may be all proper par-

[Vanderveer v. Ware.]

ties are not before the court. The personal representative of the husband has no right or interest in the subject-matter of the suit; nor have the heirs or devisees of the husband; and if they had been made parties defendant, their demurrer for misjoinder would have been sustained.

Under the statute abolishing naked or dry trusts no estate or interest passed to Porter by the conveyance expressed to be in trust for Miller and Withers. The operation of the statute is to merge the legal and equitable estates such a conveyance would have created at common law, directly and immediately in the *cestui que trust*.—*Yon v. Flinn*, 34 Ala. 409; *Tindal v. Drake*, 51 Ala. 574. The original purchasers, Miller and Withers, having parted with all interest in the lands, and the appellant having succeeded to their interest, they were not indispensable parties.—*Batre v. Auze*, 5 Ala. 173. To constitute a necessary and indispensable party to a bill, in whose absence the court will not proceed to a final decree, he must have a material interest in the issue which will be necessarily affected by the decree.—1 Dan. Ch. Pr. 190, and note. No such interest appears from the bill to reside in the absent parties it is insisted should be brought before the court.

Affirmed.

## Vanderveer v. Ware.

### *Bill in Equity by Surety to obtain Reimbursement out of Lands devised to Principal.*

1. *Surety of an executor; when equity of is subordinate to rights of alienees of principal in lands devised by testator.*—A surety of an executor, who has paid a judgment rendered against them, both principal and surety, on a debt due by the testator, and has taken an assignment thereof to himself, may, by bill in equity, alleging the insolvency of the executor (such executor being also a devisee under the will of the testator) reach and subject the individual interest of such executor in lands devised by the testator, so long as such executor remains the owner thereof. But when it is shown that such executor has aliened to others the lands devised to him, upon considerations not assailed, and has thus parted with his interest therein, without fraud, the alienees have not only the legal estate in such lands, but also an equity equal, at least, to any equity that can be preferred by the surety.

2. *Opinion on former appeal re-affirmed.*—The opinion rendered by this court in this cause on former appeal (*Vanderveer v. Ware*, 65 Ala. 606), re-affirmed.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JNO. A. FOSTER.

VOL. LXIX.



[Vanderveer v. Ware.]

The bill in this cause was filed by William P. Vanderveer against Robert Y. Ware individually and as the executor of the last will and testament of Robert J. Ware, deceased, and against the widow and children of the testator, for the purpose of subjecting lands devised by the testator to the defendants, and the rents and profits thereof, to the satisfaction of a judgment which the complainant had paid as the surety of the said Robert Y. Ware in his representative capacity. On a former appeal taken by the complainant from a decree of the Chancery Court sustaining a demurrer to, and dismissing the original bill, this court reversed that decree and remanded the cause.—*Vanderveer v. Ware*, 65 Ala. 606. Since the cause was remanded, the complainant has amended his bill, alleging, that since the filing of the original bill, Robert Y. Ware has made a final settlement of his accounts as such executor, which showed no assets of said estate in his hands; that the funds in the hands of the receiver, mentioned in the original bill, had been distributed and the receiver had been discharged; that under the will of Robert T. Ware, Robert Y. Ware took in fee certain lands, and also a remainder in other lands, therein described, which, for considerations not assailed in the bill, he had conveyed to third parties; that the alienees, when they acquired and purchased said lands, had full notice and knowledge that the estate of said testator was unsettled, and that his debts had not been paid; that the title obtained by such alienees was subordinate to complainant's right to subject the lands to the satisfaction of said judgment; and that there were no other assets belonging to said estate which could be reached and subjected, at law or in equity, to the payment of said judgment. The alienees of the lands were made parties defendant to the bill as amended, and the prayer was, that the lands might be sold and the proceeds applied to the payment of the judgment. The defendants demurred to the bill, assigning as grounds of demurrer, among others, (1) that the bill showed that they held the lands by purchase from Robert Y. Ware, after the death of the testator, but did not aver or set forth any facts showing or tending to show, that the complainant had any lien or right superior to the right and title of the defendants; and (2) that the case made by the original bill as amended, is that of a creditor without a lien seeking to subject the individual property of his debtor to his demand, without averring any fraudulent transfer or conveyance. The Chancery Court rendered a decree sustaining the demurrer and dismissing the bill, the complainant declining to amend; and this decree is here assigned as error.

WATTS & SONS and D. S. TROY, for appellant.

[Chamberlain &amp; Parker v. Dorrance.]

CLOPTON, HERBERT & CHAMBERS and SAYRE & GRAVES,  
*contra.*

(No briefs came to the hands of the reporter.)

PER CURIAM.—This cause was heretofore before this court, on appeal from the decree of the chancellor, sustaining a demurrer to, and dismissing the original bill. The theory of the original bill was, that as the appellant had become the surety of the executor, Robert Y. Ware, on a supersedeas bond, given on appeal from a judgment against him in his representative capacity, which judgment was affirmed, and after its affirmance, and the payment thereof by the appellant, was assigned to him by the plaintiff in the judgment, he stands in the relation of a judgment creditor of the testator. That theory, we held, was insupportable; but we held, in effect, that as a creditor of his principal, Robert Y. Ware, the appellant, could be subrogated to whatever rights of reimbursement the principal would have had from the estate of the testator, if he had paid the judgment; or could reach and subject whatever of interest in the real or personal property, to which the principal was entitled. *Vanderveer v. Ware*, 65 Ala. 606.

The bill has since been amended, but it does not disclose a state of facts upon which the executor, Robert Y. Ware, the principal of the appellant, could, if he had paid the judgment, support a claim to charge the lands devised, which had passed into the possession of the devisees. And it is shown, that he had aliened to others the lands devised to him, or in which he had a contingent interest, upon considerations not assailed. Whatever of individual interest the principal had, was parted with by him without fraud, and the alienees have not only the legal estate, but an equity at least equal to any which the complainant can prefer.

The decree of the chancellor is in substantial conformity to the opinion we expressed heretofore, the correctness of which we do not doubt, and must be affirmed.

STONE, J., not sitting.

## Chamberlain & Parker v. Dorrance.

*Bill in Equity to have Bill of Sale set aside as Fraudulent and Void, and for a Discovery and Account.*

1. *Fraud; how pleaded.*—Fraud is a mere conclusion of law from facts stated and proved; and when it is pleaded, at law or in equity, the facts

VOL. LXIX.

## [Chamberlain &amp; Parker v. Dorrance.]

from which it is supposed to arise, must be clearly stated, in order that the court may determine whether they constitute fraud. A mere general charge of fraud, or a mere general averment, that an act was done with covinous intent, is not sufficient.

2. *Fraud; when it can not be imputed.*—When property is sold and conveyed by a debtor to one of his creditors, absolutely and unconditionally, in payment of a just debt, which exceeded in amount twice the value of the property so sold and conveyed, without reservation to the debtor of any right or interest in the property, or in the proceeds of its sale, neither fraud nor collusion can be imputed therefrom, nor can the other creditors of the debtor thereby suffer legal wrong or injury, although the debtor be then insolvent, which fact is known to the creditor, and the property so sold and conveyed is substantially all the property then owned by the debtor.

3. *Same.*—That a creditor, taking an absolute and unconditional transfer of a stock of goods in payment of his debt, only made a casual examination of the goods, did not make an inventory thereof until after the sale and a change of possession thereunder, and failed to execute a receipt or release to the debtor, are mere circumstances of suspicion, which are overcome by the fact, that there was an absolute and unconditional sale of the property in payment of a just debt.

4. *Settlement by trustee of debt due the trust.*—A settlement by a trustee of a debt due to him as such trustee, whereby he accepted a conveyance of property by the debtor, in payment of the debt, is, at most, only voidable, at the election of the *cestuis que trust*. This right of election is personal to them, and can not be exercised for them by other creditors of the debtor, who seek to set aside the conveyance, and to appropriate to themselves the property conveyed, to the exclusion of the debt, in which the *cestuis que trust* have the beneficial interest.

## APPEAL from Mobile Chancery Court.

Heard before Hon JOHN A. FOSTER.

The bill in this cause was filed by Lise Dorrance, L. Brewer & Co., and others, creditors of Marsena A. Parker, against the said Parker, and John C. Chamberlain, individually, and as trustee of Carrie M. Parker and John B. Chamberlain, for the purpose of having a sale and transfer of goods, wares and merchandise and choses in action made by Parker to John C. Chamberlain, as such trustee, declared fraudulent and void, and for a discovery of the property thereby conveyed, and of the disposition made thereof, and for an account. The bill avers, that Marsena R. Parker, who was a wholesale and retail grocer, carrying on business in the Port of Mobile, was, on the 11th December, 1880, indebted to the complainants severally, by open accounts, itemized statements of which are made exhibits to the bill; and that, on that day, he was also largely indebted to other persons, was insolvent and in a failing condition, all of which was then well known to John C. Chamberlain; that Parker was then also largely indebted to Chamberlain as trustee, under the will of Lewis T. Woodruff, for Carrie M. Parker, a half sister of said Parker and a niece of John C. Chamberlain, and for John B. Chamberlain, son of John C. Chamberlain, for certain moneys belonging to said beneficiaries which were used



[Chamberlain &amp; Parker v. Dorrance.]

by Parker; but that the complainants "do not know the amount of such indebtedness, nor whether it was as large as the amount recited in the bill of sale from Parker to Chamberlain hereinafter mentioned;" that, in order to give the trustee an unfair and illegal preference in behalf of said debt over the complainants and his other creditors, Parker "on the date above mentioned pretended to sell to John C. Chamberlain, as trustee as aforesaid, all the property, effects and choses in action owned by him, and he, on that day, actually put said Chamberlain, trustee as aforesaid, in possession of every thing owned by him, and said Chamberlain has sold the property and collected the choses in action as far as he could, and converted every thing he so got from said Parker to his own use or to the use of said *cestuis que trust*;" that, "in order to disguise and conceal the true character of this unlawful and fraudulent purpose and transaction, said Parker and Chamberlain put the transaction and pretended sale in the form of a formal sale, and on the eleventh day of December, 1880, the better to embarrass, hinder, delay and defraud your oratrix and orators, the said Parker, with and by the procurement of said Chamberlain, executed and delivered to the said Chamberlain a bill of sale, whereby he conveyed to him, as trustee as aforesaid, all his stock of goods," a description of which is set forth, "and all choses in action or evidences of debt belonging to him;" that the bill of sale "in fact covered every thing then owned by said Parker." A copy of this bill of sale is made an exhibit to the bill. It is also averred in the bill, that the consideration of the bill of sale, according to its recitals, was twenty-five thousand dollars, which was not paid in money, but, "on the contrary, it is pretended that this sum was to be paid by an absolute, unqualified credit of twenty-five thousand dollars on the debt of Parker to the minors, Carrie M. Parker and John B. Chamberlain, of whom John C. Chamberlain was trustee, no matter how small might ultimately be the proceeds from the property conveyed by said Parker as aforesaid, and if this was not accomplished, there was no consideration for the execution of said bill of sale. Without this fixed element of price for the things sold, there could be no sale, even if the transaction had been otherwise fair and otherwise free from defects in the elements, which constitute a *bona fide* sale; and which was not the case with this transaction, as will be hereinafter shown. But this fixed element of price did not exist in said sale. The debt was a trust debt due to minors. The trustee, Chamberlain, had no authority to release and discharge the debtor, Parker, from liability on the debt to said minors to the extent of twenty-five thousand dollars, because of the execution of said bill of sale and the delivery of the property therein described," and that it is optional with

[Chamberlain & Parker v. Dorrance.]

the minors to reject the agreement when they attained their majority. It is also averred in the bill, that said sum was a most exorbitant price for said goods and choses in action, arbitrarily fixed without any account of stock, appraisement or inventory thereof having been first taken; that no inventory thereof was made until after the bill of sale was executed, and Chamberlain had taken possession thereunder; that the goods and choses in actions were worth but little over half of said sum of twenty-five thousand dollars, if so much, and that Chamberlain had not realized any thing like that amount therefrom; that Chamberlain did not examine to ascertain what choses in action belonged to Parker, or what they were worth; that he made but a casual examination of the goods, and did not know, beyond the general description contained in the bill of sale, what property and choses in action were thereby conveyed; that such was the "hot haste," with which the matter was consummated, that Chamberlain did not in fact give Parker credit on that day for said sum of twenty-five thousand dollars, by any entry then made, nor did he give Parker any receipt for said sum, or any release therefrom; that a benefit would accrue to Parker from the alleged sale and transfer, if the same be allowed to stand, which he could never have obtained by a fair sale and assignment of said property and choses in action; that "in simple terms, said Chamberlain, well knowing that said Parker was unable to pay his creditors, was utterly insolvent and in a failing condition, undertook, by the pretended credit, to pay Parker a large *bonus* to prefer him, as trustee as aforesaid, over all his other creditors; to apply every thing in the world he owned exclusively to the payment of the debt due said Chamberlain, and in order to hinder, delay or defraud the other creditors of said Parker, to disguise the real transaction under the semblance and form of a sale, when no true and *bona fide* sale was made;" that complainants have no means of ascertaining and setting forth the merchandise and choses in action which went into the possession of Chamberlain under the bill of sale, or the value thereof, except by a discovery and statement of the same from and by said Chamberlain, and that "such a discovery and statement by him is necessary to fully appreciate all the circumstances attending said alleged sale of said Parker to said Chamberlain, and to the enforcement of the rights of your oratrix and orators."

The defendants, Parker and Chamberlain, demurred to the bill on the following, among other, grounds: 1. Because the bill charges, that the sale from Parker to Chamberlain, was made to hinder, delay and defraud the complainants and other creditors of said Parker as a legal conclusion of the pleader, but it does not deny, that the sale was based upon a valuable consid-

[Chamberlain & Parker v. Dorrance.]

eration. 2. Because, while the bill charges that the sale was made to hinder, delay and defraud the complainants and other creditors of Parker, it admits, that it was based on a good and valuable consideration, and was in discharge of an antecedent debt, due from Parker to Chamberlain as trustee.

The Chancery Court, upon the hearing of the cause on demurrer, rendered a decree overruling the demurrer; and this decree is here assigned as error.

OVERALL & BESTOR, for appellants. (1.) It is the settled law of this State, that an insolvent debtor has a right to convey his property to pay his creditor an antecedent debt, and thus prefer one creditor, although it may leave him with no means to pay others.—39 Ala. 60; 61 Ala. 134; 58 Ala. 628; 55 Ala. 282; 21 Penn. St. 495. (2.) If the consideration was alleged to be *inadequate*, other creditors would have a right to complain.—59 Ala. 296. But in this case, the appellees complain that the consideration is *greater* than the value of the property sold. Instead of this being a fraud on, or prejudicial to, the rights of other creditors, the logical result is, that it would operate for their benefit, as it would leave the debtor with less to pay, and in a better condition as to any other property that he might have, or afterwards acquire, with which he could pay or settle with his other creditors. (3.) The creditors can not complain of the release made by Chamberlain, trustee, to Parker. This is a matter between him and the *cestuis que trust*, to whom he is alone answerable. They have their remedy against him. 2 Perry on Trusts, § 482; 1 Perry on Trusts, § 185; 16 Ala. 418.

J. LITTLE SMITH, *contra*. (1.) It is admitted that a failing debtor may sell all his effects to one of his creditors in consideration of an antecedent debt; but he must do so by a fair and real *bona fide* contract of sale. The mere form of a sale will not suffice to protect a covinous and fraudulent transaction, the purpose of which is, that the debtor shall obtain a benefit or *bonus* for preferring the creditor, which he could not obtain by a fair and honest sale.—*Lehman, Durr & Co. v. Kelly*, in MS; *Borland v. Mayo*, 8 Ala. 104; *Thames & Co. v. Rembert*, 63 Ala. 567; *Young v. Dumas*, 30 Ala. 62; *Crawford v. Kirksey*, 55 Ala. 293; *Sims v. Gaines*, 64 Ala. 393; *Pickett v. Pipkin*, 64 Ala. 524. The fair price required in most of the cases is generally spoken of in regard to the *sufficiency* of the price, but that is simply because a fair price is one of the usual indicia of a fair intent. (2.) If a debtor sell his property with the intent or purpose of delaying, hindering or defrauding his creditors, such purpose stamps his conduct as fraudulent, even if he sell



[Chamberlain & Parker v. Dorrance.]

for full value; and the purchaser, though paying full value, acquires no valid title against the vendor's creditors, when he knows the vendor's fraudulent purpose in making the sale, or had knowledge of facts and circumstances naturally and justly calculated to awaken suspicion in the mind of a man of ordinary care and prudence, of the fraudulent purpose of the seller. *Sims v. Gaines*, 64 Ala. 396; *Lehman, Durr & Co. v. Kelley Bro.*, in MS. (3.) No certain and irrevocably fixed price for the effects described in the bill of sale was insured to Parker by the agreement. Therefore, one of the essential attributes of a sale was wanting, and the legal effect of the arrangement was that Chamberlain might take the effects as a security for the debt, and apply the proceeds as a credit *pro tanto* on it. And the disguise of this illegal intent under the form of a sale, shows an actual fraudulent intent. There was no certain, fixed price, because neither any successor in the trust nor the beneficiaries are bound by the alleged sale, and they might hereafter disaffirm the arrangement between Chamberlain and Parker, and have the same set aside on the ground that such a contract was beyond the powers of the trustee, and unauthorized.—*Wisswall v. Stewart*, 32 Ala. 435; *Royall v. McKenzie*, 25 Ala. 363; Hill on Trustees, pp. 536 and 382-503, N. 2; *Jackson v. Walsh*, 14 Johnson, 407; W. & Tud. L. Cases in Eq. p. 53. It is no answer to say, that there was danger of losing the trust funds, because the trustee, under the facts, was bound to make good the loss.—*Clough v. Bond*, 3 Mil'n & Craig, 495; *Harri-son v. Mock*, 10 Ala. 193.

BRICKELL, C. J.—The present bill, filed by the appellees, creditors of the appellant, Parker, seeks to compel the appellant, Chamberlain, to discover and account for goods, merchandise and choses in action, it is averred, were sold and transferred to him by Parker, with the intent to delay, hinder and defraud his creditors. A mere general charge of fraud—a mere general averment that the sale and transfer were made with covinous intent is not sufficient. Fraud is a conclusion of law from facts stated and proved; and when it is pleaded at law or in equity, the facts from which it is supposed to arise must be clearly stated, that the court may determine whether they constitute fraud.—*Flewellen v. Crane*, 58 Ala. 627; *Clay v. Dennis*, 3 Ala. 375.

There are several facts and circumstances stated in this bill, to support the general charge of fraud. The first is, that the debt in payment of which the sale and transfer were made, exceeded in amount twice the value of the goods and choses in action. The validity of the debt is not controverted. There is no averment that it was not fair and just in all respects. On

[Chamberlain &amp; Parker v. Dorrance.]

the contrary, the averment is, that its consideration was trust funds belonging to minors, which Chamberlain, as trustee, had loaned to Parker. Assuming the charge to be true, as it is admitted by the demurrer, we can not perceive of what injury the fact is to the creditors of Parker. If he had sold for an inadequate consideration—for less than the real value of the property, of the inadequacy of the consideration, if it was gross, they could have justly complained. But that the debtor obtains more than the value of his property—more, as it is averred, than a prudent man would have paid for it, when the purpose is to pay a just debt, it is plain, can not be of injury to them. It may prove rather of benefit, for it removes the debt, and leaves the future acquisitions of the debtor open to their demands, to its exclusion. Or, the payment in money of a price exceeding the value of the property, which the debtor could more easily conceal than the property, thereby hindering and delaying his creditors, might be a circumstance of suspicion exciting a jealous scrutiny of the transaction. But when the property is taken in payment of a debt, that, from motives of generosity, or to procure a preference from a failing debtor, the creditor relinquishes largely more of his debt than the value of the property, can not be matter of which other creditors can complain. If Chamberlain had taken ten thousand dollars in money for his debt of twenty-five thousand dollars from Parker, the appellees would scarcely have supposed they had any cause of complaint. There is no difference, that instead of money he has taken property; there is no more cause for complaint in the one case than in the other. The preference of Chamberlain, by an unconditional sale to him, was a legal right Parker could exercise. And if it be exercised, the purpose being the payment of a just debt, without the reservation to himself of any right or interest in and to the property sold, or in the proceeds of its sale—if the sale is absolute, and from it neither he nor any personal object of his bounty, is to derive benefit, other than the benefit he derived from the payment of the debt, there can be of it no well-founded legal complaint. By a sale to a stranger, he could have converted the property into money, and have paid it to Chamberlain, compounding or discounting the debt on such terms as they deemed proper. Because of the disproportion between the amount of the debt relinquished and the value of the goods and choses in action, there can be no presumption that there was a secret trust, an undisclosed reservation for the benefit of Parker. Of such trust or reservation there is no positive averment in the bill. It is deduced as matter of inference only, because of the disparity in the price paid and the value of the goods; because of the excess of the price paid in the debt of an insolvent man, and the value of the goods, computing each in dollars.

[Chamberlain & Parker v. Dorrance.]

Fraud can not be imputed from facts and circumstances which may consist with pure intentions; and it would be rather a strained inference, to infer it from an injudicious settlement a creditor may make with a failing and insolvent debtor.—*Steele v. Kinkle*, 3 Ala. 352.

Whether Chamberlain as trustee had authority to compound the debt by taking the property at an excessive value, and whether the *cestuis que trust* have the right to repudiate the transaction, can not be important inquiries in this controversy.

There is no fact averred from which the want of authority can be inferred. All trustees having authority to loan, or to invest trust funds, have a corresponding authority to collect them, and in the collection may exercise the same powers of compounding and discharging they could exercise, if they were clothed with the beneficial interest as well as the legal title.

*Waring v. Lewis*, 53 Ala. 615; *Foscue v. Lyon*, 55 Ala. 440; *Baldwin v. Hatchett*, 56 Ala. 461. If the dealing between him and the debtor, within the line of his authority, is free from all intent and purpose, common to both, to defraud the *cestuis que trust*, in consequence of his injudiciousness it can not be disturbed.—*Waring v. Lewis*, *supra*. Or, if it were shown the original loan of trust funds to Parker was a *devastavit*, the right of Chamberlain to retain them would not be affected, and rightfully he could compound or discharge the debt, thereby indemnifying himself on such terms as he deemed proper, in view of the failing condition of the debtor.—*Tomkies v. Reynolds*, 17 Ala. 109.

But of what interest it can be to other creditors of Parker, whether the *cestuis que trust* could repudiate the transaction, it is difficult to perceive. At most, the transaction is voidable only, not void.—*Charles v. Dubose*, 29 Ala. 367. Until the *cestuis que trust* manifest an election to avoid it, for all purposes it is valid according to the intention of the parties. The right of election is personal to the *cestuis que trust*, and can not be exercised for them by the appellees for the purpose of appropriating to themselves all the property of the debtor to the exclusion of the debt in which the *cestuis que trust* have the beneficial interest.

The facts attending the transaction—the fact that Chamberlain made but a casual examination of the goods and choses in action; that no inventory of them was taken until after the sale and the change of possession, or that receipts or releases were not given Parker, must all yield as circumstances of suspicion, in the presence of the admitted fact, that for a full price there was an absolute, unconditional sale of the property in payment of a just debt. They indicate only the anxiety, and, it may be impatience, of a diligent, vigilant creditor to obtain all



[Lehman v. Levy.]

that he could from the wrecked fortunes of a failing debtor, which was a legal and moral right. When property is taken by a creditor at its full value in payment of a just debt, taken absolutely and unconditionally, there can not be fraud or collusion, nor can there be legal wrong or injury to the other creditors of the debtor.—Bump on Fraud. Con. 221; *Clemens v. Davis*, 7 Penn. St. 263; *Crawford v. Cresswell*, 55 Ala. 497. There being no liens on the property, the debtor has the right to sell, and the creditor has the right to purchase. The price is matter of agreement between them; if it be not inadequate, and the debtor divests himself of the property absolutely and unconditionally, he can exact all of his debt the creditor may covenant to surrender.

The facts specially stated in support of the general averment of fraud, do not, in contemplation of law, constitute fraud, and do not support the averment. The demurrer ought to have been sustained; and a decree will be here rendered, reversing the decree of the chancellor, sustaining the demurrer and remanding the cause, that the bill may be dismissed, unless by proper amendment a case of equitable cognizance is presented.

### Lehman v. Levy.

*Bill in Equity to have Deed absolute on its face declared a Mortgage.*

1. *Finding of Register on oral testimony; its weight on appeal.*—The finding of a register, based on the testimony of witnesses, who were present and testified orally before him, comes before a revising court with strong presumption of its verity; and this court will not reverse it, unless the preponderance of evidence against its correctness is so strong, that a judge at *nisi prius* would feel authorized to set aside a verdict rendered on similar testimony.

2. *Statute of Frauds; when note not affected by.*—A promissory note, under the statute of this State, imports a consideration; and where parties sign as sureties, contemporaneously with the principal, no independent consideration moving to the surety is necessary to bind him.

3. *Same; promise to answer for debt of another, when within.*—It is only when both liabilities continue to exist—the original debt as a subsisting liability, and the new special promise to answer for such debt—that the statute requires the “agreement, or some note or memorandum thereof, expressing the consideration,” to be “in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.”

4. *Register's report; correction of error on appeal.*—Where the register, in stating an account, commits an error in computation of interest, and an exception is taken by the injured party to the report, covering only a part of such error, this court is not authorized to go beyond the scope of

[Lehman v. Levy.]

the exception; but the error, so far as covered by the exception, will be here corrected, without remanding the cause.

APPEAL from Mobile Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed by Mary Lehman and her husband, Abraham Lehman, against Moritz Levy, for the purpose of having a deed, absolute on its face, declared a mortgage securing two notes made by them to Levy, each for \$200.00, and for a redemption of the real estate conveyed by the deed. It is averred in the bill, that one of the notes "represented a debt due" by the son of the complainants, and that Mrs. Lehman "was in fact a mere surety for the same;" and that the other note was for money loaned by Levy to the complainants, at a usurious rate of interest, the bill stating the facts upon which the charge of usury is based. Levy answered the bill, averring that both notes were made to him for money loaned to complainants, and denying that there was any usury as charged in the bill. He also averred, in substance, that the deed was executed in settlement of the notes, and denied that it was executed as a security for the payment thereof. Upon the hearing, the Chancery Court decreed that the deed was a security for the payment of the notes, in the nature of a mortgage, and that the complainants were entitled to redeem the real estate conveyed by the deed, by payment in full of the debt thereby secured; and the cause was referred to the register, to take and state an account between the complainants and defendant; "and that he ascertain and report how much, including principal and interest, is due to defendant on the claim secured by said deed or conveyance. In ascertaining this amount, the register will ascertain the amount actually paid to complainants by defendant, and the amount of the debt which the complainants assumed for their son, and compute interest thereon at eight per cent. *per annum*. The amount of said indebtedness is not to be regarded as settled by the amount of any note or evidence of debt, but by the sum of money actually received by complainants and the interest at eight per cent. thereon." On the reference had under this decree, both parties introduced witnesses, who were examined orally before the register. The testimony of the witnesses for the complainants tended to show, that one note was made by the complainants as surety for their son, and that the other note was usurious; while the testimony of the witnesses for the defendant tended to show, that both notes were made for money loaned by defendant to complainants, and that neither note was usurious. The testimony was conflicting and irreconcilable. The defendant admitted on the reference that the complainants had paid him

[Lehman v. Levy.]

\$8.00 on account of interest on the debt in controversy. The register reported, that there was due on the notes secured by the deed, principal and interest, \$580.35. The report shows, that the register reported both notes as valid debts against complainants, overruled the claim of usury set up by them, and failed to credit them with the \$8.00, which they paid Levy on account of interest. The complainants excepted to the report of the register, as shown in the opinion. The Chancery Court rendered a decree, overruling complainants' exceptions, confirming the report of the register, and ordering a sale of the property for the payment of the sum stated in the report and costs, unless the complainants paid the same within thirty days after the adjournment of the court.

From this decree Mrs. Lehman appealed, and here assigns as error the overruling of the exceptions taken to the register's report.

HANNIS TAYLOR, for appellant.

OVERALL & BESTOR, *contra*.

STONE, J.—The decree of the chancellor in this cause pronounced the deed under which appellee claimed title, to be only a mortgage security, and from that decree no appeal has been prosecuted. The questions mooted here arise out of the report of the register, ascertaining the amount due. Exceptions to the register's report were filed by the appellant, raising two questions: *First*, that part of the claim was a note given for the debt of another, and that the note thus given was void under the statute of frauds, because it failed to express the consideration upon which it was given. *Second*, that there was usury in the transaction, and the register failed to allow appellant the benefit of it as a credit. The testimony bearing on each of these questions was given orally before the register. It is in irreconcilable conflict. The testimony for appellant tends to maintain her view of this question, while that of the appellee stands diametrically opposed to each of the claims set up by appellant. The testimony can not be reconciled. The register had the witnesses present before him, and had much better means of determining their credibility than we can have. The finding of a register on testimony thus given, comes before a revising court with strong presumption of its verity. We will not reverse it, unless the preponderance of evidence against its correctness is so strong, that a judge at *nisi prius* would feel authorized to set aside a verdict rendered on similar testimony. *Smith, Ex'r, v. Inman, Adm'r*, at last term. This case falls



[Lehman v. Levy.]

far short of that rule. In fact, we are not able to affirm there is a preponderance of evidence in favor of appellant's views.

We said above that the testimony for appellant tends to maintain her view of these questions. It is certainly in direct conflict with the testimony of appellee. It can scarcely be said to present the case of a promise to pay the debt of another, which our statute requires to be in writing signed, and expressing the consideration. The language of this testimony is, "I did not get the first \$200 testified to by witness Levy. I and my wife simply went security for the debt of our son, Mark Lehman. My son brought me a note for \$200, and said he owed Levy for fixing up his office, and asked us to sign it. We did so as security for him." A note signed, under our statute imports a consideration; and where parties sign as sureties, contemporaneously with the principal, no independent consideration moving to the surety is necessary to bind him. Moreover, there is not enough in this testimony to repel the idea that this was an original undertaking, or a novation upon some new and sufficient consideration.—*Dunbar v. Smith*, 66 Ala. 490. It is only when both liabilities continue to exist—the original debt as a subsisting liability, and the new special promise to answer for such "debt, default or miscarriage"—that the statute requires the "agreement, or some note or memorandum thereof, expressing the consideration, [to be] in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing."—Code of 1876, § 2122; *Faires v. Lodane*, 10 Ala. 50; *Perrine v. Leachman*, 10 Ala. 140; *Oliver v. Hire*, 14 Ala. 590; *Blount v. Hawkins*, 19 Ala. 100; *Martin v. Black*, 20 Ala. 309; S. C. 21 Ala. 721; *Ragland v. Wynn*, 37 Ala. 32; *Rutledge v. Townsend*, 38 Ala. 706; *Bowen v. Kurtz*, 37 Iowa, 239; *Packer v. Benton*, 35 Conn. 343; *Browne*, Stat. Frauds, § 193.

There is a third exception to the register's report, that he "erred in not giving complainants credit for \$8.00 which Levy says he received on account of interest." Looking into the evidence, and the register's calculation of interest, this exception appears to be well taken. The register computed interest on each loan from the time it was made, and allowed no credit for this payment. In fact, computing interest on the two notes from the time they severally matured, and the result is an error prejudicial to appellant, in excess of eight dollars. But there is no exception which authorizes us to go beyond the eight dollars. We therefore correct the report, and declare and decree the sum due defendant at the time the report was confirmed—July 6, 1881—to be (\$572.35) five hundred and seventy-two dollars and thirty-five cents. In all other respects the decree of the chancellor is affirmed, and the register will pro-

[Hawley v. Bibb.]

ceed to enforce the same for said corrected sum, as directed and ordered by the chancellor. Let the appellee pay the costs of appeal in this court and in the court below.

Reversed and rendered.

## Hawley v. Bibb.

### *Bill in Equity to Foreclose Mortgage.*

1. *Future contracts; when invalid.*—While the sale of goods, to be delivered at a future day, is valid, although the vendor neither has the goods in his possession, nor has contracted for the purchase of them, nor has any expectation of acquiring them except by purchase at some time before the day of delivery; yet, if from the nature of the transaction and the circumstances attending it, whatever may be the form of the contract, it is apparent that the parties did not intend either a purchase or sale, or a delivery of the goods, but that, at the time appointed for delivery, the transaction should be closed upon the basis of the then market price, the losing party paying to the other the difference,—such a transaction is a wager, and is void at common law.

2. *Same; when advances made therefor by broker recoverable.*—In the absence of a statute pronouncing future contracts, which are mere wagers, illegal and void, the general rule is that where a party makes such contracts through a broker, for a commission only, which is payable in any event, whether loss or gain result to the principal, such broker having no interest in the contracts, the principal is bound to reimburse the broker for advances made for him, if he subsequently execute his note or bill therefor, or make an express promise to pay them, or if, with full knowledge of the facts and without objection, he permits the transaction to proceed.

3. *Contracts founded on a gambling consideration void under the statute.* The statute of this State (Code, § 2131) pronounces all contracts founded, in whole or in part, on a gambling consideration, void; and under its operation, negotiable instruments made upon a gaming consideration, or for a wager, are void, even in the hands of an innocent holder for value.

4. *Contracts founded on a loan or advance of money to bet or stake as a wager; their validity.*—If a party employ a broker to make for him contracts for the future delivery of cotton, and gives to such broker his acceptance of a bill of exchange to be discounted and used in making such contracts; and if at the time it was his purpose, as was known to the broker, neither to actually buy nor sell cotton, nor to receive or deliver it, but simply to stake margins to cover differences in price, and, on final settlement, merely to receive or pay the difference between the contract price and the market price at the time fixed by the contract for delivery,—the consideration of the bill of exchange would represent a loan or advance of money to bet or stake as a wager on the future price of cotton; and if the contract further contemplates that the money is to be advanced and loaned in this State, upon transactions to be made here, the bill of exchange would fall within the interdiction of the statute, and would be void in the hands of an innocent holder for value.

5. *Validity of contract determined by the law of place of performance.*—The force and validity of a contract, made in this State, but in the per-

[Hawley v. Bibb.]

formance of which all acts and transactions were contemplated and were in fact done and performed in another State, must be determined by the law of that State.

6. *Common law presumed to prevail in New York.*—In absence of proof to the contrary, the common law is presumed to prevail in the State of New York.

7. *Bill of exchange; when bona fide holder not affected by illegal consideration at common law.* At common law, a *bona fide* holder of a bill of exchange, founded on a gambling consideration, which rendered the bill void as between the immediate parties, can not be affected by such illegal consideration.

8. *Bill to foreclose mortgage; what defenses may be made thereto.*—On a bill filed to foreclose a mortgage by the assignee of the debt secured thereby, no other defenses involving the validity of the debt are open, than could be made in an action at law on the debt.

### APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The bill of exchange secured by the mortgage, for the foreclosure of which this suit was brought, was, at the time it was drawn and accepted by J. Du Bose Bibb, endorsed by E. H. Morrison & Co., the payees, to R. M. Waters & Co., and the mortgage was exeuted directly to them. R. M. Waters & Co. endorsed the bill to the appellant, but did not, by assignment, pass the legal estate in the mortgage to him. When this cause was before this court at the December Term, 1877, on appeal from a decree of foreclosure of the mortgage and sale of the lands conveyed thereby, R. M. Waters & Co. were held to have been indispensable parties to the bill, and the decree of the lower court was reversed and the cause remanded on account of the failure to make them parties. On account of an agreement between the parties, this court, on that appeal, declined to consider the question touching the legality of the contract for the purchase of cotton, set up in the answer.—*Bibb v. Hawley*, 59 Ala. 403.

After this cause was remanded, the complainant amended the bill by making R. M. Waters & Co. parties defendant thereto; and on the hearing, had upon the pleadings and proof, the chancellor held, that the bill of exchange secured by the mortgage was founded on a gambling consideration, and was void. He, therefore, caused a decree to be entered dismissing the bill; and this decree is here assigned as error.

The purpose of the bill and the case made by the record are sufficiently stated in the opinion.

W. A. GUNTER, for appellant.

R. M. WILLIAMSON, *contra*.

BRICKELL, C. J.—The original bill was filed by the appellant to foreclose a mortgage on lands, executed by the appellee,



[Hawley v. Bibb.]

Bibb, on the 23d day of November, 1872, to secure the payment of a bill of exchange, of which he was the drawer and acceptor, falling due June 1st, 1873, for the payment to E. H. Morrison & Co. of the sum of five thousand three hundred and twenty dollars. The bill was endorsed by the payees to R. M. Waters & Co., by whom, before its maturity, for value, it was endorsed to the appellant. The defense urged by Bibb is, that the only consideration for the bill was money to be advanced to him by the payees, to enable him to engage in the buying and selling of "cotton futures," or in the nominal sale or purchase of cotton for future delivery, the purchaser and seller understanding and agreeing, that at the time appointed for the delivery of the cotton, the cotton was not to be delivered, but that there would be a settlement, and the one or the other would receive or pay the difference between the contract price and the market price at that time.

When the bill was drawn and the mortgage executed, Morrison & Co. gave Bibb a writing, which is exhibited with his answer, in which the making of the bill, and the execution of the mortgage are recited, and it is stated that the bill had been given to Morrison & Co. for discount for the account of Bibb, and by which they agreed "to purchase for future delivery one thousand bales of cotton, as he [Bibb] may direct, in the city of New York, and keep up his margin on the same as may be required, until said first day of June next, or purchase for him said cotton for any months between now and said first day of June next, keeping up his margins on the same. And said Bibb agrees to make good to us at settlement any amount it may be necessary for us to deposit for his account as loss on the purchases, over and above the bill of exchange." On the 20th January, 1873, Morrison & Co. bought for Bibb, through Waters & Co., of New York, five hundred bales of cotton to be delivered in April, and five hundred bales deliverable in May. The market in New York having a downward tendency, on the 11th March, 1873, Morrison made sales of these contracts, informing Bibb thereof, which he repudiated, unless the May contract was replaced, and five hundred bales for delivery in June were purchased. The April contract seems to have been replaced, and cotton continuing to lower in price, and Bibb declining to make further advances, or to indemnify Morrison & Co. for making them, the transaction was closed, leaving a balance against Bibb of more than two thousand dollars in excess of the bill of exchange. The purchases and sales of cotton for Bibb were to be made in the city of New York, and there was no express understanding or agreement between him and Morrison & Co. as to the actual delivery of the cotton, nor was there any express understanding or agreement as to a settlement, nor

[Hawley v. Bibb.]

the terms of such settlement, between Bibb and the persons with whom they negotiated contracts for him. It is a fair inference from the evidence that Bibb and Morrison each expected and intended that the contracts would be made as such contracts were usually made in the city of New York. The contracts were actually made, of which Bibb was informed, in view of, and subject to, the rules and regulations of the Cotton Exchange of New York City. According to these rules, as they are found in the record, and as they are embodied in the contracts made by Morrison & Co., the seller of the cotton had the option, on five days' notice, at any time within the month designated for delivery, to deliver the cotton in quantities of not less than fifty bales, and the purchaser was bound to receive it, paying the contract price.

The effect and validity of contracts for the sale and future delivery of personal property, of which the seller has not possession or ownership at the time of the sale, has been the subject of much contestation and litigation in the courts of this country and of England, in recent years. Since the decision of the Court of Exchequer in *Hibblewhite v. M' Morine*, 5 Mess. & Wels. 462, departing from and overruling the opinion expressed by Lord TENTERDEN in *Lorymer v. Smith*, B. & C. (8 E. C. L.), 1, and in *Bryan v. Lewis*, Ryan & Moody (21 E. C. L.), 386, the authorities generally have concurred, that a contract for the sale of goods to be delivered at a future day, is valid, though at the time the vendor has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them otherwise than by a purchase at some time before the day of delivery.—*Stanton v. Small*, 3 Sandf. (Sup. Ct.) 230; *Bigelow v. Benedict*, 70 N. Y. 202; *Yerkes v. Solomon*, 18 N. Y. Sup. Ct. (11 Hun) 471; *Gregory v. Wendell*, 39 Mich. 337; *Logan v. Musick*, 82 Ill. 415; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155; *Rumsey v. Berry*, 65 Me. 570; *Porter v. Viets*, 1 Bissell 177; *Clarke v. Foss*, 7 Bissell 540. But whatever may be the form of the contract, if from the nature of the transaction, and the circumstances attending it, whether the contract is written or unwritten, it is apparent, that the purpose was not to buy or to sell the goods, that no delivery of them was intended—that title to them should never pass, but that at the time appointed for delivery, the transaction should be closed upon the basis of the then market price of the goods, the losing party paying to the other the difference, the transaction is a wager, and though there may not be a statute denouncing it as violative of public policy, it is offensive to the common law and void.—*Grizerwood v. Blane*, 11 Com. Bench (73 Eng. C. L.), 526; *Gregory v. Wendell*, *supra*; *Kirkpatrick v. Bonsall*, *supra*; *Ex parte Young*, 6 Bissell, 53; *Rumsey v.*

[Hawley v. Bibb.]

*Berry, supra*; *Brud's Appeal*, 55 Penn. St. 294; *Lyon v. Culbertson*, 83 Ill. 33.

Brokers, or agents are frequently employed to make such contracts. The general rule is, that even when such contracts are in fact wagers, if in them the broker or agent has no interest; if in any event he can not gain or lose; whether there is profit or loss, he is entitled to his commissions only, the principal is bound to reimburse him for advances, if he subsequently executes his note or bill, or makes an express promise to pay them; or if, with full knowledge of the facts, without objection he permits the transaction to proceed, if there be not a statute pronouncing the transaction illegal and void.—*Cannan v. Bryce*, 3. Barn. & Ald. 179; *De Begnis v. Armistead*, 10 Bing. 105; *Ashton v. Dakin*, 4 Hurl. & Norman, 869; *Knight v. Cumbers*, 15 Com. Bench, (80 Eng. C. L.) 563; *Rosewarne v. Billing*, 15 Com. Bench, N. S. (109 Eng. C. L.) 316; *Brown v. Speyers*, 20 Gratt. 296; *Clarke v. Foss*, 7 Bissell 540.

The statute of this State pronounces all contracts founded in whole or in part on a gambling consideration, void; and any person who has lost money or other thing of value upon any game or wager, can recover it in an action commenced within six months after payment or delivery.—Code of 1876, § 2131. Negotiable promissory notes, or bills of exchange made upon a gaming consideration, or for a wager, under the operation of the statute, are void, even in the hands of an innocent holder for value.—*Manning v. Manning*, 8 Ala. 138; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Ivey v. Nicks*, 14 Ala. 564.

There are connected with this particular transaction facts and circumstances indicating that the purpose of Bibb, as was known to Morrison, was neither to buy or sell cotton actually, nor to receive or deliver it, at the time appointed for delivery; that neither of them contemplated the investment of money in a purchase of cotton, but simply the staking of margins to cover difference in price; and that the final settlement of the transaction should result only in Bibb receiving or paying the difference in the contract price, and in the market price at the time appointed for delivery. If this be the proper solution of the evidence, the consideration of the bill of exchange, as between them, represents a loan or advance of money, to bet or stake as a wager on the future price of cotton. One who loans or advances money for the purpose of being used in gambling, can not recover it.—*M'Kinnell v. Robinson*, 3 Mees. & Wels. 434; *Perkins v. Savage*, 15 Wend. 412; *White v. Buss*, 3 Cush. 448; *Cannon v. Bryce*, 3 Barn. & Ald. 179. And if the contract had contemplated that the money should have been advanced and loaned in this State, upon transactions made here, the bill of exchange would fall within the



[Hawley v. Bibb.]

interdiction of the statute, and would be void even in the hands of an innocent holder for value.

The case does not require that we should inquire whether this is the just solution of the evidence. The contract between Bibb and Morrison, though entered into in this State, did not contemplate that any act should be done and performed, or any transaction had here, in performance of it. All acts or transactions in pursuance of it, were to be done and performed, as they were done and performed, in the City of New York. There the advances or loans, on the faith of the bill, and for which the bill was a security, were made, and the purchases of the cotton were there made. The force and validity of the contract must therefore be measured by the law of that State, and not by the law of this State. If there be a statute of that State touching wagering contracts, it does not form a part of the evidence in the cause. The presumption must therefore obtain, that the common law there prevails and is of force. Whether a wager on an indifferent subject was offensive to the common law, or whether it would be enforced, is not a question for consideration. A wager contrary to good morals, or sound policy was void at common law.—*Ball v. Gilbert*, 12 Me. 397. Gaming contracts of every species, and contracts of this character are gaming contracts, were void at common law.—*Grizewood v. Blanc*, *supra*; *Pritchett v. Ins. Co.* 3 Yeates, 438. It must be assumed then, if the contract out of which the bill arises, is of the character we are supposing, that it is void by the common law prevailing in New York. A *bona fide* holder of the bill, and that the appellant stands in that capacity is not questioned, can not be affected by the illegality of consideration, which would render it void as between the immediate parties. Illegality of consideration affects the right and title of *bona fide* holders, only when by statute the invalidity of the instrument is pronounced, and it is made void in the hands of every holder, whether he has notice of the illegality or not.—*Saltmarsh v. Tuthill*, 13 Ala. 390.

This proposition is not controverted, but it is insisted, that though the appellant takes the bill freed from all infirmity because of illegality of consideration, he does not so acquire the mortgage, which was not expressly assigned to him, and which passes as the mere incident to, and security for the bill. But we think that the weight of authority is, that on a bill to foreclose by the assignee of the mortgage debt, no other or further defenses as to the validity of the debt are open, than could be made, if the action were at law upon the debt.—*Pierce v. Faunce*, 47, Me. 507. It would be rather anomalous, that the appellant should have an unquestioned right to the debt—that in equity and good conscience the appellee should be bound to

[Collier & Son v. Faulk & Martin.]

pay it to him, and yet, that a security for the debt, the mere incident to the debt, should not be enforced.

The decree of the chancellor must be reversed, and a decree here rendered granting the appellant appropriate relief.

## Collier & Son v. Faulk & Martin.

### *Special Action on the Case and Trover joined.*

2. *Mortgage of unplanted crop; does not pass legal title; equitable lien merely conferred; remedy of mortgagee.*—A mortgage of an unplanted crop of cotton does not pass to the mortgagee such title as, without possession taken thereunder, will support trover, trespass or detinue; but an equitable lien is thereby conferred, which, though it can not be enforced *as such*, except in equity, can be made the basis of an action on the case against a stranger, who, with notice of the lien, destroys, removes or conceals such crop; or of an action of assumpsit for money had and received against one to whom the mortgagee has sold or otherwise disposed of the crop, and who, with notice of the lien, himself sells it and receives the proceeds of sale.

2. *Crop lien note operates a lien only for the amount expressed therein.* A crop lien note, executed in accordance with the requirements of the statute, for an amount expressly named therein, but containing also a stipulation, that it shall stand as security for any additional advances over and above such amount, can not operate a valid security for such additional advances, but only for the amount expressly named in the note.

3. *Mortgage executed to secure future advances; its validity and operation.*—A mortgage executed to secure future advances, if not tainted with bad faith or fraud, is just as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and encumbrancers, with notice, so far, at least, as respects advances made before the equities of such purchasers or encumbrancers had attached; nor is it necessary that a *definite* or *specific* sum should be stated in such mortgage, as the ultimate amount intended to be secured, all that is required being that the mortgage should describe the nature and amount of such advances with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry.

4. *Rule of construction of statutes.*—It is the ordinary right of every citizen to contract with reference to his own private property and rights, just as he may see fit, provided only he use his own so as, in no manner, to injure another, and in no wise to offend any principle of public policy; and no law should be construed to abrogate this right unless such is its manifest intention.

5. *When contract constitutes contracting parties tenants in common.*—Independent of, and apart from the influence of § 3475 of the Code, a contract between two parties farming together, by the terms of which one is to furnish the land and stock and feed for stock, and the other all the labor to make a crop, the crop when made to be equally divided between them, constitute the parties thereto tenants in common of the crop raised by them under the contract.

6. *Sections 3474 and 3475 of the Code construed.*—The act of February 9, 1877 (Acts 1876-7, p. 74), which is now partially embraced in sections

[Collier &amp; Son v. Faulk &amp; Martin.]

3474 and 3475 of the Code, did not totally abrogate or abolish the relation of tenants in common in the cases coming within the purview of the act, but only modified it so as to give to each tenant in common a lien on the share of the other in the crops jointly raised, with the remedy of enforcing it by attachment. (BRICKELL, C. J., *dissenting*.)

APPEAL from Pike Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

The appellants, on 20th September, 1880, brought this suit against the appellees. The complaint, as amended, contained two counts, one in trover and the other in case, in both of which the appellants sought to recover the value of four bales of cotton, alleged to have been part of a crop grown by one Marsh, in the year 1879, on which appellants had a mortgage and also a crop lien note, both executed by Marsh, which cotton the appellees purchased from Marsh, with notice of appellants' mortgage and note. The defendants pleaded "the general issue and payment of the mortgage debt." On the trial the appellants read in evidence a crop lien note made by Marsh, for \$100.00 dated 18th January, 1879, and payable to them on 1st October, 1879, the terms of which, except a provision for additional advances, were in conformity with the requirements of the statute; and also a mortgage on Marsh's "entire crop grown the present year by him or under his direction in Pike County, Alabama," of even date with the note and securing the same, as well as "any advancements that may be advanced under said lien note or otherwise in goods, wares or merchandise of any description, or money during the present year." Both the note and mortgage were shown to have been duly recorded in said county. The evidence also tended to show that Marsh and one Reeves "farmed together in the year, 1879, under contract substantially as follows: that the said Reeves furnished the land and stock and feed for the stock and Marsh furnished all the labor, to make the crop during said year, and the crop was to be divided between them in equal proportions;" that under said contract Marsh and Reeves made a crop of cotton in said county during said year, and that of the crop so raised Marsh sold three bales of cotton to the appellees; that the note had been paid, but that Marsh owed appellants a balance for advances which, during said year, they had made to him over and above the amount stated in the note. This being substantially all the evidence, the court charged the jury, at the written request of appellees, defendants in the court below, that if they believed the evidence they must find for the defendants; and to the giving of this charge the appellants excepted, and here assign the same as error.

M. N. CARLISLE, for appellant



[Collier &amp; Son v. Faulk &amp; Martin.]

GRIFFIN & WOOD, *contra*.

SOMERVILLE, J.—If the only count in the complaint in this case had been in trover, the charge given by the court, that the jury must find for the defendants if they believe the evidence, would have been correct. It would be supported fully by the cases of *Grant v. Steiner*, 65 Ala. 499, and *Rees v. Coats*, Ib. 256, in which it was held, that the mortgagee of an unplanted crop of cotton acquired no such title as would support an action of *trover*, *trespass* or *detinue*, at least before possession taken under the mortgage.—*Cook v. Corthell*, 23 Amer. Rep. 518.

But such a mortgage confers an equitable lien, which, though it can not be enforced *as such*, except in equity, can be made the basis of an action of *assumpsit* for money had and received, or an action on the case at law. Where the tenant has sold or otherwise disposed of the crop to a purchaser who, having notice of the landlord's lien, himself sells and receives the proceeds of sale, *assumpsit* is the proper remedy.—*Westmoreland v. Foster*, 69 Ala. 448; *Thompson v. Merriman*, 15 Ala. 166.

So it is also settled that the landlord, not having waived his lien, may maintain a special action on the case against a stranger with notice of the lien, who destroys, removes or converts the crop to his own use—*Hussey v. Peebles*, 53 Ala. 432.

The complaint contains a special count in *case*, and we think that, under the evidence disclosed in the bill of exceptions, the charge of the court below was erroneous.

The plaintiffs, upon the trial in the Circuit Court, introduced in evidence a *crop-lien note*, executed January 18, 1879, which purported to be for one hundred dollars, and was secured by lien on the crops and other personal property of Marsh, the obligor. It also contained a stipulation that it should stand good for future advances. It could be, however, under no circumstances, a valid security for more than the amount expressed in the *written note* or *obligation* executed by Marsh. The statute is too clear for argument on this point.—*Evans v. English*, 61 Ala. 416; Code, 1876, § 2286. The testimony showing that this note had been *paid*, the recitals in it were not effectual as a security for sums left indefinite, and for the payment of which there was no written promise or obligation.

It would, however, be otherwise with the *mortgage* executed by Marsh on the same day, which was given to Collier & Son, the appellants, not only to secure the note of \$100.00, but also as security for any advances that the mortgagees might make to the mortgagor during the current year, whether in money or otherwise.

The question has been much discussed as to how far mortga-

[Collier &amp; Son v. Faulk &amp; Martin.]

ges of this character for *future advances* are good, and what should be the nature of their recitals. It seems to be clearly settled that, if they are not tainted with fraud, or bad faith, they are just as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and incumbrancers, so far, at least, as respects advances made before the equities of such purchasers or incumbrancers have attached.—*Dirver v. McLaughlin*, 20 Amer. Dec. 653, and *note*; *Hubbard v. Savage*, 8 Conn. 215; *Lovelace v. Webb*, 62 Ala. 271; *Summers v. Roos & Co.*, 2 Amer. Rep. 658; *Bank v. Cunningham*, 24 Pick. 270; *Robinson v. Williams*, 22 New York Rep. 380; *Ward v. Cooke*, 18 N. J. Eq. 93; 4 Waits Act. & Def. 541–42.

Nor is it necessary in such a mortgage that a *definite or specific sum* should be stated on the face of the instrument as the ultimate amount intended to be secured. There is, it is true, a considerable diversity of opinion on this subject, but this conclusion is sustained by the weight of authority as the sounder principle.—*Dirver v. McLaughlin*, (*supra*) 20 Amer. Dec. 658; 1 Jones on Mortg. §§ 364–7; *Lovelace v. Webb*, 62 Ala. 271. All that can be required is, that a mortgage designed to secure such future liabilities should describe the nature and amount of them with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry. 1 Jones on Mort. § 367; *Wilczynski v. Everman*, 51 Miss. 841; *Stoughton v. Pasco*, 13 Amer. Dec. 72; *Dirver v. McLaughlin*, 20 Amer. Dec. 661, *note*.

We think that the description of the liability intended to be secured by Marsh's mortgage to appellants was sufficiently definite. It is recited there to be any advances that may be made in goods, wares or merchandise, of any description, or money, during the year 1879. This gave an equitable lien on the crops raised by the mortgage for that year, and the registration of the mortgage was constructive notice to all persons in the county where recorded, who purchased the mortgaged property. *Allen v. Lathrop*, 46 Ga. 133; *Insurance Co. v. Brown*, 11 Mich. 265; *Robinson v. Williams*, 22 N. Y. 380; *Ward v. Cooke*, 17 N. J. Eq. 93; *Bissell v. Kellogg*, 60 Barb. 617; 4 Wait's Act. & Def. 588–589.

It is insisted that the mortgagor, Marsh, had no mortgageable interest in the cotton in controversy, as he furnished only the *labor* to cultivate it, and Reeves the *land* and *teams*—that, notwithstanding their express agreement to farm on shares as tenants in common, the contract of hire only existed between them under the provisions of section 3475 of the Code.

Apart from the influence of this statute, it has long been settled in this State, that contracts like that between Reeves

[Collier & Son v. Faulk & Martin.]

and Marsh, by which they were to farm on shares and divide the crops in equal proportion between them, created the relation of tenants in common.—*Smyth v. Tankersley*, 20 Ala. 212; *Williams v. Nolen*, 34 Ala. 167.

Was it the intention of the General Assembly to abolish this relation *in toto*, in all cases coming within the influence of this statute, or only to modify it *sub modo*, so as to effect the purpose of the statute? While the question is not entirely free from difficulty, we are inclined to the latter view.

The plain purpose of the act of February 9, 1877 (Acts 1876-77, p. 74), which is now partially embraced in sections 3474 and 3475 of the Code, was to protect both the rights of the landlord and of the agricultural laborer, so as to furnish each an efficient remedy against the frauds or unfair dealings of the other. This is effected by securing to each a lien on the share of the other in the crops jointly raised, and held as tenants in common, with the remedy of enforcing it by attachment. Where this remedy is invoked by either, the plaintiff's interest in the crop is reduced, by operation of the statute, to a moneyed valuation, and enforced as a lien debt against the co-tenant by attachment. For this purpose, and to this extent, the relation of landlord and tenant, with all its incidents and rights, in the one case, and the contract of hire, with the relation of employer and employee in the other, are declared respectively to exist. When this protection is secured, the function of the statute is fulfilled, and the legislative purpose accomplished. The rights and relation of the contracting parties must be construed to remain as fixed by themselves, and are not intended to be abrogated or destroyed to any greater extent than is required to carry out the legislative intent.

This conclusion, we think, is based on a general rule of construction applicable alike to all statutes. It is the ordinary right of every citizen to contract with reference to his own private property and rights just as he may see fit, provided only he may use his own so as in no manner to injure another, and in no wise to offend any principle of public policy. No law should be construed to abrogate this right unless such is its manifest intention.

This construction, too, is in better harmony with section 3479 of the Code, which preserves the relation of tenants in common in cases where persons farm on shares, and adopts the same policy of mutual protection by giving each part-owner of the crops a lien on the share of the other for certain expenses incurred in cultivating and gathering them.

It can not be argued that the legislature intended by the provisions of section 3475, to protect the land-owner by securing to him the exclusive legal title to the crops, and that for this



[Levy &amp; Co. v. Moog.]

purpose the contract of hire was substituted for the relation of tenants in common. For, if the laborer happens to furnish the *teams*, under a similar construction of section 3474, the legal title of the crops would at once vest exclusively in the laborer, leaving only a naked lien for the landlord. Our conclusion, therefore, is that Marsh owned an undivided half interest, as tenant in common, with Reeves under the contract between them to farm on shares, and that he had a lawful right to mortgage his interest to the appellant.

As the evidence in the case showed that about one hundred and eighty dollars was due appellants under the mortgage for advances made to Marsh, the mortgagor, and remained unpaid, the charge of the court was erroneous, and its judgment is reversed and the cause is remanded for further proceedings in accordance with the principles announced in this opinion.

BRICKELL, C. J., *dissenting* on the last point, as to the construction of §§ 3474-75 of the Code.

## Levy & Co. v. Moog.

### *Application for Supersedeas of Execution on Forfeited Replevy Bond.*

1. *Contest of exemptions; when replevy bond executed, and property condemned, verdict should ascertain value of property replevied.*—The verdict of a jury, on the trial of a contest of a claim of exemption filed by defendant in attachment to personal property, on which the writ had been levied, under § 2838 of the Code, finding the property in the contest liable to sale under the attachment, and a judgment of condemnation rendered thereon, will not support an execution issued against the obligors on a forthcoming bond, which was executed on behalf of such defendant under the provisions of § 2836 of the Code, unless the value of the property, for the delivery of which the bond was executed, is by such verdict ascertained. And an execution issued on such bond, without the value of the property replevied having been thus first ascertained, should be quashed.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. F. TOULMIN.

This was a petition by A. & B. Moog against M. P. Levy & Co. for a *supersedeas*, seeking to quash an execution issued against the petitioners as sureties, and one Theodore Weis, as principal, on a forthcoming bond, which had been executed by them under the provisions of section 2836 of the Code, and which had been returned forfeited by the sheriff. The material facts are stated in the opinion. The *supersedeas* was issued,

[Levy &amp; Co. v. Moog.]

and on the hearing the Circuit Court rendered judgment quashing the execution; and this judgment is here assigned as error.

OVERALL & BESTOR, for appellants.

MACARTNEY & CLARKE and CHAS. J. TORREY, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—We think a proper construction of the statutes, bearing on this case, plainly authorized the action of the court in granting the petition for *supersedeas*, and in quashing the execution against the appellees.

The contest was originally one of exemption in an attachment suit instituted by the appellants, Levy & Co., against one Weis, who claimed as exempt from the process certain personal property upon which a levy had been made. The appellees, Moog, were sureties on the forthcoming replevin bond executed by Weis, the claimant, under the provisions of section 2836 of the Code. Upon the trial of the cause, the property in contest was found liable to sale under the process, and judgment was entered in favor of the plaintiffs in attachment condemning the property for sale, in accordance with section 2838 of the Code. The verdict of the jury failed, however, to *ascertain the value of the property*, for the delivery of which the bond was executed.

We think this was indispensable. The statute does not require it expressly, but it is demanded by clear implication. Section 2836 of the Code, having reference to exemption contests and the execution of the requisite bonds by the contestants, provides, that, after the delivery of the personal property to the party making the bond, “and, on the termination of the suit, the same proceedings shall be had as provided for in chapter 4, title 1, part 3, of this Code.” This chapter, thus referred to, relates to proceedings in *detinue*, for the recovery of personal property *in specie*. In such cases “judgment against either party must be for the property sued for, *or its alternate value*, with damages for the detention to the time of trial.” Code, § 2944.

The next section (§ 2945) proceeds to declare, that “if either of the parties who are unsuccessful in the suit, fail within thirty days after judgment to deliver the property to the sheriff, and return be made thereof by him of the fact, the *bond* in either case has the *force and effect of a judgment*, and *execution* may issue thereon against all the obligors, *for the alternate judgment so rendered as aforesaid*, and the damages and costs.”

It is obvious that there must be some method by which to

[McCall v. McCurdy.]

*fix the amount* for which the execution in the forfeited bond is authorized to issue. In *detinue* cases, this is done by reference made to the alternate judgment of valuation. And while section 2838, authorizing judgment to be rendered condemning the property claimed as exempt, does not in so many words require the jury to fix the value of the property in their verdict, we think the reference made in section 2836 to proceedings in *detinue* suits is futile without such requirement.

The verdict of the jury should, therefore, have ascertained the value of the property claimed by Weis to be exempt, and which was sought to be condemned. In the absence of such ascertainment, the execution could not be lawfully issued, and was properly quashed. A special statute was considered by the legislature to be necessary in order to remedy this defect in the case of forthcoming bonds, given in ordinary attachment suits. This was done by authorizing the sheriff, or other officer, to fix the value of the property replevied before the issue of execution on the forfeited bond.—Acts 1880-81, pp. 54-55. That act, however, has no application to this case.

The judgment of the Circuit Court is affirmed.

## McCall v. McCurdy.

### *Bill of Review for Errors of Law Apparent.*

1. *Bill of review ; its object and effect.*—The object and effect of a bill of review, when filed because of error of law apparent, or because of newly discovered evidence pressing upon the matter in issue in the former suit, are the reversal of the decree, so far as it is erroneous, and to retry the cause upon the original record in the one case, or, in the other, upon the original and new proof.

2. *Same ; its averments and prayer.*—In a bill of review for error of law apparent on the record, if the decree has not been carried into execution, the proper prayer is simply, that the decree may be reviewed and reversed ; but if the decree has been executed, the facts touching the execution thereof should be stated, and the prayer of the bill should be for the further decree of the court, that the party complaining may be put in the condition in which he would have been, if the decree had not been executed.

3. *Same ; difference in remedy thereby afforded from that of writ of error or appeal.*—A bill of review for error apparent, and a writ of error or an appeal, under our system, are not concurrent and co-extensive remedies. The errors which will support the former, are also available under the latter ; but there are many errors and irregularities, which will work a reversal on error or appeal, that will not support a bill of review.

4. *Same ; what errors will support.*—A bill of review can not rest merely on strict law, on errors of form, or mere irregularity of proceeding ; but, in order to sustain such a bill, there must be error of substance,



[McCall v. McCurdy.]

error in the conclusions of the court on matters of law affecting the rights of the party complaining, and it must be apparent that he has suffered injury from the error.

5. *Same; assignment of errors.*—It is the settled practice, that, in a bill of review for errors apparent, the errors relied on for a reversal must be distinctly pointed out; and that none, other than those specifically assigned, will be noticed or considered.

6. *Same; what error will not support.*—The personal representative of the deceased mortgagor is a necessary party to a bill to foreclose, unless it is affirmatively shown that the personal assets can not, in any event, be made liable for any part of the mortgage debt; and the failure to make him a party may be taken advantage of by the heirs, by demurrer on the hearing, or on appeal; but it would not be error on which to found a bill of review, at their instance, unless it is shown, that the non-joinder has injuriously affected their rights.

7. *Appointment of administrator ad litem nugatory prior to statute authorizing it.*—The appointment of an administrator *ad litem* prior to the passage of the statute authorizing it, was nugatory, and conferred no right upon the party appointed to represent the decedent, of whose estate he was appointed such administrator.

8. *Infant defendants; when process can be served on their mother for them.*—When the widow of a deceased mortgagor is made a party to a bill for foreclosure, because an assignment of dower to her is prayed, her interest is not adverse to that of the infant heirs; and process for them, they residing with her, was, in such case, properly served on her under the former rule of practice. (Rule 20, Rev. Code, p. 825).

9. *Appointment of guardian ad litem; must affirmatively appear on appeal, but not so, on a bill of review.*—A decree against an infant will be reversed on error or appeal, unless the record affirmatively shows the appointment of a guardian *ad litem* for him, and such appointment will not be inferred from the fact that an answer was filed by a person styling himself guardian *ad litem*; but, when the record shows, that an answer was filed, and defense made, by a person acting as guardian *ad litem*, the failure of the record to show his appointment by the court, is not an error which will support a bill of review.

10. *Decree of foreclosure of mortgaged lands descended to infants; when error in will not support a bill of review.*—When lands, mortgaged by the ancestor, have descended to infants, it is error to render a decree of foreclosure and sale of such lands, when susceptible of division, without an inquiry by the register, upon a reference, whether a sale of the entire premises, or of a part only, is necessary, and if of a part only, what part it would be most beneficial to them to sell; and this error would reverse the decree on appeal; but it is not such an error as will support a bill of review, where it does not appear that any real injury was done to the infants by the omission to order the inquiry.

APPEAL from Lowndes Chancery Court.

Heard before Hon. JOHN A. FOSTER.

On the 24th April, 1866, James D. McCall, being indebted to Georgia A. Reese, a minor, executed and delivered to her guardian, as security for such indebtedness, a mortgage on certain real estate in Lowndes county therein described. On 24th December, 1867, McCall died intestate, leaving a widow and minor children. On 2d July, 1868, the said Georgia A. Reese, then of age, filed her bill in the Chancery Court of Lowndes county for the purpose of foreclosing said mortgage and of having the widow's dower assigned to her, making parties de-

[McCall v. McCurdy.]

fendant thereto the widow and minor children of James D. McCall and one Phillip H. Cook, who is described in the bill as the administrator *ad litem* of James D. McCall, under the appointment of the Probate Court of said county. On 8th October, 1868, a decree was rendered in said cause assigning dower to the widow of McCall, foreclosing said mortgage, and ordering a sale of the property thereby conveyed, except the widow's dower. On 1st February, 1869, the lands embraced in the order of sale were sold by the register to Georgia A. Reese, and afterwards, on a confirmation of the sale by, and under the order of, the court, the register executed a deed conveying said lands to her. She was let into the possession of the lands embraced in her purchase about the time of the sale, and continued therein until about January, 1870, when she was married to Edmund S. McCurdy; and since her marriage she and her husband have been in the possession of said lands. In September, 1881, James D. McCall, then twenty-three years of age, and Roland McCall, a minor, the only surviving heirs at law of the said James D. McCall, deceased, filed the bill in this cause against the said Georgia A. McCurdy, (formerly Reese) and her husband, setting up the foregoing facts, making a transcript of said foreclosure suit an exhibit, averring that there are no debts outstanding and unpaid against the estate of the said James D. McCall, deceased, and charging, that said decree of foreclosure and sale of said lands was and is invalid and unauthorized and illegal, for grounds set forth, and which, with the proceedings in said suit on which they are based, are sufficiently stated in the opinion.

The prayer of the bill is, that said decree of foreclosure, and the sale and proceedings had thereunder, be reviewed, reversed and annulled, and that complainants be restored to their rights, as if said decree had not been rendered, and the proceedings had not been had; that an account be taken of the amount due on the debt secured by said mortgage, and also of the value of the rents of said lands since they have been in the possession of the said Georgia A. McCurdy and her husband, and that she, as mortgagee, be charged with, and decreed to account for, the same; and for general relief. The defendants demurred to the bill, the principal grounds being, that the errors complained of in the bill were mere irregularities, and not such errors as would support a bill of review, and that the bill not only seeks to correct errors, but also seeks relief beyond the scope and purpose of a bill of review; and they also moved to dismiss the bill for want of equity. The Chancery Court, on the hearing, rendered a decree sustaining both the demurrer and the motion to dismiss, and dismissing the bill; and this decree is here assigned as error.

[McCall v. McCurdy.]

COOK & ENOCHS, and TROY & TOMPKINS, for appellants. (1). A bill of review may be filed for the double purpose of revising and reversing the decree complained of, and for placing the parties back into the situation they would have held, if said decree had not been carried into execution.—2 Dan. Ch. Pl. & Pr. p. 1580. (2). A bill of review is revisory and corrective in its nature and effects; and there are many points of analogy between such a bill and an appeal.—Lube's Eq. Pl. by Wheeler, pp. 177, 178-9, 180-1; and note (1) on p. 177. This proceeding is, therefore, not a collateral attack upon the decree sought to be reversed, but is as direct a remedy as that by appeal or writ of error. (3). The personal representative of a deceased mortgagor is a necessary party to a bill to foreclose; and the failure to make him a party is fatal to the decree.—*Dooly v. Villalonga*, 61 Ala. 129. (4). At the time of the filing of the bill for foreclosure, the statute authorizing the appointment of administrators *ad litem* had not been enacted. (5). The record must affirmatively show the appointment of a guardian *ad litem* for infant defendants, or the decree can not be sustained.—*Darrington v. Borland*, 3 Port. 9; *Rowland v. Jones*, 62 Ala. 322. (6). It is error for a court, in a suit for the foreclosure of a mortgage of lands descended to infants, to decree a sale of the whole premises in absence of report by the register ascertaining whether the amount due could not be raised by a sale of a part, instead of the whole.—*Eslava v. Lepretre*, 21 Ala. 504; *Fry v. Merchants Ins. Co.*, 15 Ala. 810.

CLOPTON, HERBERT & CHAMBERS, *contra*.—(1). The bill in this case is an original bill for redemption, partaking, in some respects, of the nature of a bill of review. Its purpose is not to correct or reverse the decree because of error upon its face, but to review, reverse and annul it, because of certain alleged *irregularities and defects in the proceedings*, on account of which, it is averred that the decree of foreclosure and of sale is invalid, unauthorized and illegal; and it seeks to remove such decree and sale as obstructions to redeeming.—*Ex parte Smith*, 34 Ala. 455; *Goodman v. Tennessee Manf'g Co.*, 1 Head (Tenn.), 172; *Groce v. Field*, 13 Ga. 24; *Turner v. Berry*, 8 Ill. 541; *Randon v. Cartwright*, 3 Tex. 267; *Gardner v. Emerson*, 40 Ill. 296. (2). All the errors alleged in the bill as apparent, are mere irregularities in the proceedings, sufficient on appeal, but insufficient to support a bill of review. The non-joinder of the administrator of the mortgagor can not support the bill, unless it be shown, that injury or mischief resulted to the complainants. This has not been done.—*Whiting v. Bank of United States*, 13 Peters, 6-14. (3). The mother's interest was not adverse to that of the minors, and process served on her



[McCall v. McCurdy.]

for them, brought them into court; and it thereupon became the duty of the court, being general guardian for all infants, to take charge of and protect their interests.—*Preston v. Dunn*, 25 Ala. 507; *Tabor v. Lorance*, 53 Ala. 543; *Stabler v. Cook*, 57 Ala. 22. The appointment of guardian *ad litem*, if made without service and otherwise irregular, does not render the decree void.—*Bondurant v. Sibley's Heirs*, 27 Ala. 565. While the record fails to show the order of appointment, it shows that a guardian *ad litem* did in fact represent the infants. In such case, the decree not being void, the failure of the record to show a formal order of appointment, though reversible error on appeal, is not such an error as will support a bill of review. *Rhoads v. Rhoads*, 43 Ill. 239; *Frierson v. Travis*, 39 Ala. 150. (4). The “error apparent” necessary to a bill of review, is error in the final decree. The whole record, other than the evidence, may be looked to, not for the purpose of ascertaining merely whether there be irregularities and defects in the interlocutory orders and proceedings preceding the decree; but for the purpose of ascertaining whether there be “*error apparent*” upon the face of the *final decree*; or if error, whether it is not an erroneous judgment of the chancellor.—*McDougald v. Dougherty*, 39 Ala. 409; *Noble v. Hallonquist*, 53 Ala. 229; *Tankersley v. Pettis*, 61 Ala. 354. If there be no error in the decree, error in sale thereunder will not support a bill of review. *Whiting v. Bank of United States*, 13 Peters, 14. Nor errors in interlocutory orders.—*Field v. Williamson*, 4 Sandf. Ch. (N. Y.) 613; 2 Barb. Ch. Pr. 93. (5). “No party to a decree can, *by the general principles of equity*, claim a reversal of a decree upon a *bill of review*, unless *he has been aggrieved by it*, whatever may have been his rights to insist on the error at the original hearing, or on appeal.”—*Whiting v. Bank of United States, supra*; *Yeager's Appeal*, 34 Penn. St. 173.

BRICKELL, C. J.—The objects and effect of a bill of review, when filed because of error of law apparent, or because of newly discovered evidence pressing upon the matter in issue in the former suit, are the reversal of the decree, so far as it is erroneous, and to retry the cause upon the original record in the one case, or, in the other, upon the original and new proof. The present bill, in form and substance, has the essential and distinguishing properties and qualities of a bill of review for error of law apparent, and is without the qualities or properties of a bill impeaching a decree for fraud, and, of consequence, its annulment *in toto*. There is no averment of any fact or circumstance implicating the party obtaining the decree in fraudulent conduct or motive. The scope of inquiry opened by the bill, so far as it relates to the decree is, whether there is

[McCall v. McCurdy.]

error apparent upon the record, aggrieving the complainants, entitling them to a reversal. The decree having been carried into execution,—a sale of the lands made under it; a conveyance executed; and the purchaser, the party in whose favor the decree was rendered, let into possession, taking the rents and profits,—the facts are stated, accompanied with a prayer for redemption, an account of the rents and profits, and their application to the payment of the mortgage debt, so that, if there should be a reversal of the decree, the parties complaining may be placed in the situation and condition in which they would have been, if the decree had not been executed. This is not, as is suggested in one of the causes of demurrer assigned, and in the argument of the counsel for the appellees, the introduction of matter which may not be incorporated in a bill of review, and relief prayed beyond the objects and purposes of such a bill. When the decree has not, in the point and matter complained of, been carried into execution, the proper prayer of a bill of review is, simply that the decree may be reviewed and reversed. But, when it has been carried into execution, and a simple reversal will not repair the injury resulting from it, a prayer for the further decree of the court to put the party complaining into the condition in which he would have been if the decree had not been executed, is proper and usual.—Story's Eq. Pl. § 420; Mitford's Eq. Pl. 188. The restoration of parties to the plight and condition in which they were, at and prior to the rendition of an erroneous judgment or decree, and the restitution of all advantages the party obtaining it may have acquired by its enforcement, upon reversal, it is the spirit and policy of the law to promote and compel, when there are not facts or circumstances which may render restitution inequitable. 3 Bac. Ab. *Error*, Sec. 3, 389; Freeman on Judgments, § 482; *Marks v. Cowles*, 61 Ala. 299. In *Bank of U. S. v. Bank of Washington*, 6 Peters, 17, it is said: "On the reversal of the judgment, the law raises an obligation on the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances." If there be error of law apparent on the record, of injury to the party complaining, for which the decree should be reversed, the court would not be administering complete justice, would not quiet litigation, if it halted at a simple reversal, remitting the complainants to another suit for the vacation of the sale and conveyance of the lands, a redemption, and account of the rents and profits. All persons affected by the decree are before the court, and the bill, so far as it states the facts subsequent to the decree, may be regarded as a supplemental bill, which may be properly added to,

[McCall v. McCurdy.]

or connected with a bill of review, when facts may have occurred rendering it necessary. The bill is then a compound bill of review and of supplement.—*Whiting v. Bank U. S.*, 13 Peters, 6; *Bank of U. S. v. Ritchie*, 8 Peters, 128.

There is much of difficulty in defining the errors of law apparent on the face of the decree, which will support a bill of review. The bill partakes of the nature of a writ of error, or of an appeal, in our system, the substitute for a writ of error. Though of the nature of a writ of error, which is said to have led to its introduction into the practice and procedure of courts of equity, and though each is a remedy for the revision and correction of errors in final decrees, it can not be said they are concurrent and co-extensive remedies.—*Green v. Jenkins*, 1 De G., F. & J. 454. The errors upon which a bill of review may be founded, would be open to examination and correction on a writ of error. There are, however, errors which will support the writ, not available as a basis for the bill. On a writ of error, the whole record is drawn under the consideration of the court, and advantage may be taken of all errors or irregularities which may have intervened in the course of the proceedings, if they have not been waived, as well as errors apparent. The error of the decree in any respect, whether it be of law or of fact, is open to inquiry and to correction. The errors which will support a bill of review are errors of law *apparent* on the face of the decree. There must be error in substance, of prejudice to the party complaining, apparent on the face of the pleadings, proceedings or decree.—*Yeager's Appeal*, 34 Penn. St. 173. Or, as it is expressed in 2 Dan. Ch. Pr. 1576, "the decree complained of, must be contrary to some statutory enactment, or some principle or rule of law or equity, recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the court."—*Whiting v. Bank U. S.*, 13 Peters, 6; *Buffington v. Harvey*, 95 U. S. 99; *McDougald v. Dougherty*, 39 Ala. 409; *P. & M. Bank v. Dundas*, 10 Ala. 661; *Tankersley v. Pettis*, 61 Ala. 354. Though it is said, error apparent exists, when the decree is at variance with the forms and practice of the court, it must not be understood that the bill can be maintained because of matter of form, or that the propriety of the decree can be questioned.—Story's Eq. Pl. § 411; 2 Dan. Ch. 1577; *Green v. Jenkins, supra*; *Haig v. Ho-man*, 8 Cl. & Fin. 320. Comparing the decree with the pleadings and other proceedings, it must be apparent that the court has reached and declared an erroneous conclusion of law, as to the rights of the parties. Whatever of error other than this, which may have intervened—errors in the regularity of the proceedings, erroneous deductions from the evidence—must be corrected by writ of error, or by appeal; it is not the office of



[McCall v. McCurdy.]

a bill of review to inquire into and correct them.—*Finley v. Taylor*, 8 Baxter, (Tenn.) 237; *Berdanatti v. Sexton*, 2 Tenn. Ch. 699; *Winston v. Johnson*, 2 Mumf. 305.

If a bill of review for error apparent was not limited and confined in the scope of its inquiry to the class of errors we have indicated,—if it stood upon the same footing and had the same office as a writ of error—if it would lie to retry the cause merely because the court had erred in its apprehension and construction of the evidence, or because mere irregularity in the course of the proceedings had supervened, litigation would be protracted, and the policy of the statute limiting appeals to a short term, without an exception in favor of persons laboring under disability, excepted from the statute limiting bills of review, would be contravened and often defeated.

It is the settled practice upon a bill of review for errors apparent, that the errors relied on for a reversal must be distinctly pointed out in the bill, and no others than such as are specifically assigned will be noticed or considered.—*Moore v. Moore*, 2 Vesey, Sr. 598; *Green v. Jenkins*, 1 De G., F. & J. 454; *L. & M. R. R. Co. v. Rainey*, 7 Cald. 447; *Berdanatti v. Sexton*, *supra*; *Gilchrist v. Buie*, 1 Dev. & Bat. Eq. 359. The bill can be maintained only by parties having an interest affected by the decree. And even parties having an interest must be aggrieved by the particular errors assigned, or the bill can not be maintained, whatever may have been the right to insist on such errors at the original hearing, or on a writ of error or appeal.

*Whiting v. U. S. Bank*, 13 Peters. 6; *Gilchrist v. Buie*, *supra*; *Lansing v. Albany Ins. Co.*, Hopkins Ch. 102.

Without subjecting to rigorous criticism the specific assignment of errors found in the bill, accepting them in the sense in which the pleader intended they should be taken, we will examine them separately.

The first is, that the personal representative of the deceased mortgagor was not made a party defendant to the former suit. When it is not shown that the personal representative is without interest; that the personal assets can not in any event be made liable for the payment of the mortgage debt, because it is barred by the statute of non-claim, or by the statute of limitations, or from some other cause, he is a necessary party to a bill to foreclose. The omission to make him a party may be taken advantage of by the heir on demurrer, or on the hearing; and it is a defect of which the court will on appeal, *ex mero motu*, take notice.—*Dooley v. Villalonga*, 61 Ala. 129. There was an administrator *ad litem* of the deceased mortgagor (as he is styled in the pleadings), deriving his appointment from the court of probate, made a party defendant to the original bill. When the bill was filed and the decree rendered, there was no

[McCall v. McCurdy.]

such administrator or administration known to our laws, and the appointment of such an administrator was nugatory, conferring no right to represent the deceased.—*Dooley v. Villalonga, supra*. The reason the presence of the personal representative is necessary on a bill to foreclose is, that as the personal assets may be made liable for any balance of the debt unsatisfied by a sale of the mortgaged premises, he ought to have the opportunity of controverting the debt, or of proving its payment, in whole or in part. A further reason is that the statutes charge him with duties in reference to the lands of his testator or intestate, the renting or sale of them for the payment of debts, and he ought to have the opportunity of preventing any improper sale of them, or any unjust divestiture of the estate residing in the testator or intestate at the time of his death, whether the estate is legal or equitable. It is apparent that the reasons for making the personal representative a party to a bill for foreclosure pertain wholly to the rights and duties of his administration, and though the omission to make him a party could be insisted on by the heirs by demurrer, on the hearing, or on appeal, it can not be made the ground of error on a bill of review, unless it is shown that the non-joinder has affected their rights—that if he had been a party, the decree would then have been in point of law erroneous.—*Whiting v. U. S. Bank, supra*. No such injury is shown by the bill, or could possibly be asserted. The debt and mortgage are established by the decree, and must have been established if the personal representative had been a party. How far the decree may affect the personal representative, it will be time enough to inquire when he complains of and seeks redress against it. The complainants in the present bill have not suffered prejudice from it, and can not complain of it in this mode.

The second assignment of error is, that the complainants, who are infants, were not properly made parties, process for them being served on the mother, who was adverse in interest to them. It is enough to say of this assignment, that it is not supported by the record. The original bill avers the complainants were infants, under fourteen years of age, residing with their mother. The rule of practice in courts of chancery, of force when the bill was filed, (Rule 20, R. C. 1867, p. 825,) required that summons against infants issuing on bills should be served upon their parents, or either of them, if in life. The father being dead, the mother was the only party upon whom the process could be served. As to the foreclosure and sale of the mortgaged premises, the only point and matter in which the decree is complained of, she was without interest, and was not a proper party to the bill. She was a party solely because an assignment of dower to her was prayed.

[McCall v. McCurdy.]

The third assignment of error is founded on the failure of the record to disclose that the guardian *ad litem*, appearing for the complainants, making defense, answering and putting in issue the allegations of the bill, was appointed by the court. The representation of infants in judicial proceedings is matter of necessity. Their rights and interests will become involved in litigation, and are as subject to the jurisdiction of courts as are the rights and interests of adults. The courts observe great caution in adjudicating against them, and are vigilant in protecting them. A guardian *ad litem* appointed by the court, in the presence and under the supervision of the court, makes full defense for them, and can not, by any act, admission, or omission, prejudice the defense. The protective care of the court, and the fidelity of the guardian is a security against unjust judgments depriving them of their rights. It is true, that when a decree against an infant is assailed by appeal or writ of error, the record must affirmatively show the appointment of a guardian *ad litem*, or it will be reversed. The appointment will not be inferred from the fact that an answer is filed by one styling himself such guardian.—*Darrington v. Borland*, 3 Porter, 9; *Rowland v. Jones*, 62 Ala. 322. Conceding all this, an error of this kind directed against the regularity of the proceedings, not affecting the merits, is not the error apparent, upon which a bill of review can be founded. The Court of Chancery is the guardian of all infants within its jurisdiction, or who are parties to judicial proceedings conducted before it. When it suffers a representation for the infants, permits defense to be made, and the suit to progress to a final decree, the error of not making a formal appointment, or if it is made, not causing it to be entered of record, is mere irregularity, error of form, rather than of substance. We are aware of no authority which would authorize the impeachment of the decree because of such irregularity, as error apparent, supporting a bill of review.

The fourth assignment of error is not supported by the record. There were no consents or admissions made by the guardian *ad litem*. The consents and admissions found in the record were made by the solicitors of the complainants in the original suit, and had no reference to any matter involved in the decree of foreclosure and sale.

The fifth and last assignment of error is, that a sale of the entire premises was ordered, without a reference to the register to ascertain and report whether a sale of the whole, or only a part, was necessary for the payment of the mortgage debt. In *Fry v. Merchants Ins. Co.*, 15 Ala. 810, it was decided, that it was error to decree a foreclosure of a mortgage, and a sale of lands descending to infants, without an inquiry whether a sale of the whole, or of a part only, was necessary to pay the debt;



[Mooney v. Walter.]

and, if a part only, what part it would be most beneficial to them to sell. The rule is capable of application, only when the lands are susceptible of partition, or division, or when they consist of several distinct parcels.—2 Jones' Mort. § 1616 *et seq.* Upon the face of the record it does not appear that any real injury was done the infants by the omission to order the inquiry. It does not appear, and it could appear only from evidence, that the lands had ever been used in separate parcels. The fair inference, if inference could be resorted to, is, that they were held, used, and conveyed as one plantation; and it does not appear that they were capable of partition without lessening the value. Nor is it apparent that, if sold in parcels, they would have commanded any larger sum than was realized by the sale made. Without disturbing the authority, or departing from the case of *Fry v Merchants Insurance Co.*, *supra*, however available as an assignment of error the omission to order the inquiry would be on appeal, it is not error apparent which will support a bill of review. Such a bill can not rest merely on strict law, on errors of form, or mere irregularity of proceeding. There must be error of substance—error in the conclusions of the court on matter of law affecting the rights of the parties, and it must be apparent that injury has resulted from the error.—*Haig v. Homan*, 8 Cl. & Fin. 320; *Tommey v. White*, 1 H. L. Cases, 164. *Berdanatti v. Sexton*, 2 Tenn. Ch. 706; *Whiting v. U. S. Bank*, 13 Peters, 6; *P. & M. Bank v. Dundas*, 10 Ala. 661. Litigation can not be kept open—the finality of the decrees of courts determining the rights of parties can not rest on doubt or suspense, at the mere will or caprice of parties, subject to be disturbed only if circumstances render it to their interest, the same circumstances rendering it inequitable to their adversaries, for mere errors in the course of judicial proceedings, not appearing to work substantial injury.

The errors assigned in the bill did not authorize a review and reversal of the former decree, and the demurrer to them was properly sustained.

Affirmed.

## Mooney v. Walter.

*Bill in Equity to Enjoin Sale under Power in Mortgage, and for an Account.*

1. *Exceptions to register's report; when note of evidence required.*—Under Rule 93 of Chancery Practice, a party excepting to that part of a

[Mooney v. Walter.]

register's report which is based on conclusions of fact drawn from the evidence introduced on a reference before him, is required to note the evidence or parts of evidence he relies on in support of his exception, "with such designation and marks of reference as to direct the attention of the court to the same;" and failing to do so, it is not error for the chancery court to refuse to sustain the exception, although it may be well taken.

2. *Bill to enjoin sale under mortgage; when cross bill not necessary to support decree of sale for payment of mortgage debt.*—Under a bill filed by a mortgagor seeking to enjoin a sale of property conveyed by mortgage under a power contained therein, on the grounds of usury and payment, and offering to pay whatever sum might be adjudged to be due on the mortgage debt, and submitting himself to the jurisdiction of the court, a court of equity, deriving jurisdiction from such offer and submission, has adequate power, without a cross bill, to decree a sale of the mortgaged premises for a payment of the mortgage debt, unless the same is paid by the mortgagor within the time specified in the decree.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The facts touching the points decided by the court are sufficiently stated in the opinion.

H. A. HERBERT and RICE & WILEY, for appellant.

D. S. TROY, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—We can see no error in the decree of the chancellor, in this case, overruling the exceptions taken to the report of the register. These exceptions have reference to conclusions of fact drawn from the evidence, and the Rule of Chancery Practice requires, in such cases, that the party taking the exception should note the evidence, or parts of evidence, he relies on in support of such exception, "with such designation and marks of reference, as to direct the attention of the court to the same."—Rule 93 of Chancery Practice, p. 174, Code, 1876. The purpose of this rule is to relieve the court of the necessity of "wandering at large into the evidence, in order to ascertain whether by possibility the master was wrong in his conclusion or not."—*Per* STORY, J., in *Donnell v. Ins. Co.* 2 Sum. 371; *Mahone v. Williams*, 39 Ala. 202. The appellant having failed to conform to the requirements of this rule, the chancellor did not err in refusing to sustain the exceptions, even had they been well taken.

There was no error in the decree of the chancellor ordering the mortgaged premises to be sold for the payment of the mortgage debt, without a *cross-bill* being filed by the defendant. The appellant, as mortgagor, had sought by her bill to enjoin a sale of the lands, under a power in the mortgage, on the grounds

[Daffron v. Crump.]

of usury and payment. She had properly offered to pay whatever sum might be adjudged to be due by her to the mortgagee, and had submitted herself to the jurisdiction of the court. The decree permitted her to redeem upon paying the amount of the mortgage debt, with costs, within thirty days, and, upon default of such payment, ordered the register to proceed to sell the land for the purpose of paying the debt, and after satisfying the same, to pay over the surplus to the mortgagor. Though the practice in some of the States is to require, in cases of this character, a cross-bill praying for foreclosure, the rule is otherwise under our system of practice. The power of a court of equity is adequate to grant full relief by sale of the mortgaged premises, and decree against the complainant for the amount admitted in the bill to be due, without a cross-bill. This jurisdiction is derived from the offer of the complainant to pay the debt, and the submission by her of the case to the court, which can always compel one to *do equity*, who *invokes equity* at its hands.—*Eslava v. Crampton*, 61 Ala. 507; *Branch Bank v. Strother*, 15 Ala. 51; 2 Jones on Mort. §§ 1106-7.

The decree of the chancellor is affirmed.

## Daffron v. Crump.

### *Claim Suit for Personal Property.*

1. *Statutory separate estate of wife; what is.*—If a purchase of personal property is made by the husband with the proceeds of the *corpus* of the wife's statutory separate estate, and no conveyance in writing is made, and nothing is said at the time of the purchase as to the person for whom it is made, whether for the wife or for the husband, the personal property so purchased belongs to the wife as her statutory separate estate.

2. *Same; income from; the husband's rights therein.*—Crops raised on lands belonging to the wife's statutory separate estate after the marriage, constitute income and profit, which go to the husband as the wife's trustee, and are not subject to the payment of his debts; but if such crops are used by the husband in the purchase of personal property, the trust no longer follows them, but the property so purchased belongs to him, and is subject to the payment of his debts.

3. *Evidence; ownership of personal property a fact to which a witness may testify.*—Ownership of personal property is a fact, to which a witness may testify; but on cross examination such witness can be required to state the particular facts, on which the claim of ownership rests.

4. *Evidence; admissibility of declarations.*—While, as a rule, on the trial of the right of property, declarations or admissions by the defendant in execution, made in the absence of the claimant, are hearsay and not admissible evidence; yet, declarations by parties in possession of personal property explanatory of their possession, constitute a part of the



[Daffron v. Crump.]

*res gestæ*, and may be given in evidence, no matter who are the parties to the suit. Such declarations, however, must not go beyond the time at which they are spoken.

APPEAL from St. Clair Circuit Court.

Tried before Hon. LEROY F. BOX.

The appellee having obtained a judgment against Wesley Daffron, the husband of the appellant, before a justice of the peace, caused an execution to be issued thereon, which was levied on a "yoke of oxen," as the property of the defendant in execution. A claim to the oxen was interposed by the appellant under the statute, which was tried before the justice, and from the judgment rendered by him an appeal was taken to the Circuit Court, where the cause was tried *de novo*. The evidence introduced on the trial tended to show, that the defendant in execution purchased the oxen in controversy from one Wright, and paid him therefor ten bushels of wheat, and gave his note for the balance, which he afterwards paid out of the proceeds of wheat and cotton which he had sold; and that the wheat and cotton so used in the purchase of the oxen were raised on lands belonging to the appellant as her statutory separate estate; but it was not shown whether the wheat and cotton were raised before or after their marriage. At the time of the purchase nothing was said as to the person for whom the oxen were bought, whether for the husband or the wife. Both the appellant and her husband were examined as witnesses on her behalf, and to each of them her counsel propounded in substance this question: "To whom did said oxen belong after the purchase and before they were taken under execution;" but the court, on objection made by the appellee, refused to allow the question to be answered, and the appellant excepted. The appellee also introduced in evidence, against the appellant's objection, declarations made by the husband tending to show that he had asserted ownership in the oxen, and the appellant excepted.

The court, in its general charge, instructed the jury, "that, if Wesley Daffron by instrument in writing, in the execution of which the wife did not join, sold wheat and cotton which was grown on his wife's land and got money for it, the money so obtained would be his property, and if he used said money in purchasing other property, the property so purchased would be his, and would be liable to said execution." To this charge the appellant excepted. The jury returned a verdict in favor of the appellee, upon which a judgment was rendered condemning the oxen to the satisfaction of the appellee's execution; and from that judgment this appeal was taken. The errors assigned are the rulings of the court above noted.

[Daffron v. Crump.]

STONE, J.—The present record does not inform us whether the wheat and cotton, which were used in paying for the oxen, were produced before or after the marriage of claimant with Mr. Daffron. If before, then they were of the *corpus* of her estate. If afterwards, they were income and profits. The proper settlement of this question enters materially into the power and authority of the husband over their proceeds, and consequently into the question of ownership of the oxen. If the wheat and cotton were of the *corpus* of the wife's estate, then, inasmuch as the title to chattels is not usually evidenced by writing, and there is no evidence that the title to the oxen was conveyed in writing, the fact that the husband negotiated the purchase would not determine the ownership of the oxen. The proceeds of the sale of such property "is the separate estate of the wife, and may be reinvested in other property, which is also the separate estate of the wife."—Code of 1876, § 2709; *Evans v. English*, 61 Ala. 416, 422; *Marks v. Cowles*, 53 Ala. 499; *Sterrett v. Coleman*, 57 Ala. 172. So, if the purchase was made with the proceeds of the *corpus* of Mrs. Daffron's estate, and if no paper conveyance was made to Daffron, and if, as testified by Wright, the seller, "nothing was said at the time as to who he was purchasing the oxen for," then they became the property of Mrs. Daffron.—*Evans v. English, supra*.

If, however, the wheat and cotton, with which the oxen were paid for, were produced after the marriage of Mr. and Mrs. Daffron, the rule is different. Such income and profits go to the husband, who administers the same, "and is not required to account with the wife, her heirs or legal representatives" for the same. True, he receives them only as trustee, and so long as they remain income and profits, they are not subject to the payment of his debts.—Code of 1876, § 2706. When, however, they are used by the husband in the purchase of property, the trust follows them no farther. They then become property of the husband, with all the incidents of property belonging to him.—*Early, Lane & Co. v. Owens & Co.*, 68 Ala. 171. The charge given can hardly be reconciled with the above views.

In *Nelson v. Iverson*, 24 Ala. 9–18, it is declared that ownership of personal property is a fact to which a witness may testify. Each of the witnesses, Mr. and Mrs. Daffron, proposed to testify as to the ownership of the property. This testimony was ruled out on the objection of plaintiff in execution. In this the Circuit Court erred. The witnesses should have been allowed to answer the question. Of course, on cross examination, they could have been required to state the particular facts, on which the claim of ownership rested.—*S. & N. R. R. Co. v. McLendon*, 63 Ala. 266.

Two principles of evidence, settled in this State, will proba-

[Lowe v. Guice.]

bly arise on another trial. In trials of the right of property, declarations or admissions by the defendant in execution, made in the absence of the claimant, are, as a rule, not admissible. They come under the class of hearsay evidence. But parties in possession of such property may make declarations explanatory of their possession, and either claim or disclaim ownership of the property, and such declarations may be given in evidence in an issue of disputed ownership, no matter who may be the parties to the suit. This, because they are supposed to constitute a part of the *res gestæ*. Such declarations, however, must not go beyond the time at which they are spoken. A declaration as to how title was acquired, is not admissible.—*Thomas v. Degraffenreid*, 17 Ala. 602; 1 Brick. Dig. 837, §§ 461–2, 4, 471–2; *Hicks v. Lawson*, 39 Ala. 90; 1 Brick. Dig. 838–9, §§ 487, 490, *et seq.*; *Perry v. Graham*, 18 Ala. 822. What is here said is intended more as a guide for another trial, than as a special comment on the rulings on those questions shown in this record. We reverse alone on the refusal of the court to receive testimony of ownership by Mr. and Mrs. Daffron.

Reversed and remanded.

## Lowe v. Guice.

### *Bill in Equity to set aside Sale of Lands made under a decree of the Probate Court.*

1. *When courts of equity will not reopen decrees of courts of probate.* In the absence of facts and circumstances showing that a decree of the court of probate is inequitable, of which the party complaining could not have availed himself in that cause, when the decree was rendered, and that he is without fault or neglect, a court of equity can not reopen the litigation the decree was intended to close.

2. *Order of court of probate confirming sale of lands; its effect.*—The order of a court of probate confirming the sale of lands made by an administrator, is a decree of that court rendered on inquiry, all parties in interest having the opportunity of being heard, and of contesting or of supporting the sale; and if rendered in a case in which the court has jurisdiction, in the absence of fraud, such decree is final and conclusive of the adequacy of the price for which the lands sold, and of all other facts necessarily involved in its rendition, unless assailed on error or appeal.

3. *Same; when court of equity will not vacate.*—After the confirmation by the court of probate of the sale of lands by an administrator under a former decree of that court, mere inadequacy of the price for which the lands were sold is not a sufficient ground to authorize a court of equity to intervene to vacate the sale, there being an absence of all unfairness, and the parties interested not being surprised.



[Lowe v. Guice.]

APPEAL from Barbour Chancery Court.

Heard before JOHN M. McKLEROY, Esquire, acting as Special Chancellor.

The bill in this cause was filed on the 10th day of February, 1882, by James, Rhoda J. and Mary E. Lowe, the only children and heirs at law of John Lowe, deceased, the appellants, against the appellee, for the purpose of vacating and setting aside a sale of lands made by the administrator of their father's estate under the decree of the Court of Probate of Barbour county, on the ground that the price bid and paid for the lands was grossly inadequate. The bill shows that James Lowe became of age on the 3d of March, 1880, that Rhoda J. Lowe is about two years younger than James, and that Mary E. Lowe is still a minor; that the lands, about 380 acres, were sold in November, 1868, to Whitfield Clark for thirty-eight dollars, and the sale was duly reported on the 2d day of December, 1868, and on the second Monday in December, 1868, the sale was duly confirmed; that the value of the lands was two dollars per acre, and that the appellee is now the owner of the lands, he holding as a derivative purchaser under Whitfield Clark. A demurrer was interposed to the bill, which was sustained by the court and the bill dismissed. The decree of the Chancery Court sustaining the demurrer and dismissing the bill is here assigned as error.

WILLIAMS & WHITE, for appellants.—(1). In a private sale inadequacy of price is a badge of fraud.—*Gordon, Rankin & Co. v. Tweedy*, December Term, 1881. Is the rule different, or should there be a different rule when a representative sells real estate in which minors are interested? In one instance the sale is private and creditors are defrauded; in the other the sale is had under the forms of law, and the rights of infants who had an estate in the property sold are sacrificed. In the one case, the creditors have but an equitable lien, if that; in the other, infants own the land. The failing debtor has the right to sell for a fair and honest price; the representative can not do less and remain true to his trust. Is not inadequacy of price as much a badge of fraud in a judicial sale, as in a private sale? And when the inadequacy is so great as to "shock the conscience," is not the purchaser a party to the fraud equally with the vendor? If the consideration paid is, when compared with the actual value of the property, so trifling that fraud follows as a necessary or reasonable inference, the purchaser is certainly a party to the wrong. Being a party, he acquires no property that he can transmit, nor rights that another can derive from him. (2). It matters not that fraud may not have been intended either in the sale or in its confirmation. Fraud resulted in both

[Lowe v. Guice.]

instances, and that is sufficient. It was a constructive fraud. 2 Brick. Dig. p. 13.

PUGH & MERRILL, *contra*.—(1). The court of probate had acquired jurisdiction of the sale of the lands, and its action, to the final confirmation of the sale, is regular. Its decree of confirmation is, therefore, binding on all parties in interest. While the court of probate is a court of limited jurisdiction, when that jurisdiction once attaches, its judgments and decrees, if regular, are as conclusive and binding as are those of the highest courts in the land. If there was error in the decree of confirmation, an appeal was the remedy of the parties aggrieved. There was no appeal, but the parties permitted the decree to remain undisturbed, and it is now binding and conclusive on them, although they were minors.—*Waring v. Lewis*, 53 Ala. 615; *Otis, Adm'r, v. Dargan*, 53 Ala. 178. (2). "When property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless there is surprise without fault on the part of those interested; and in no case of this description, after confirmation of the sale, unless fraud can be imputed to the purchaser, which was unknown at the time of the confirmation."—*Littell v. Zuntz*, 2 Ala. 256. No fraud can be imputed here. Mere inadequacy of price can not, in any sense, be deemed fraud in a judicial sale. (3). If the complainants ever had, after the confirmation of the sale, a right to maintain this proceeding, they waited too long; and the court will not now consider the question, especially after the land has passed into the hands of sub-purchasers.—*Hunt v. Ellison*, 32 Ala. 173, and authorities there cited; *Daniel v. Modarwell*, 22 Ala. 365; *Lankford v. Jackson*, 21 Ala. 650.

BRICKELL, C. J.—The purpose of the bill is the vacation of a sale of lands, made under an order of the court of probate, reported to, and confirmed by the court, and the purchaser let into possession more than thirteen years before the bill was filed. The jurisdiction of the court to order the sale, and to decree its confirmation, is apparent, and is not assailed. Fraud is not imputed to the administrator, or to the purchaser, in making the sale, in the report thereof to the court of probate, or in obtaining the decree of confirmation. The whole gravamen of the complaint is, that the price bid and paid for the lands was grossly inadequate.

All sales of lands made by a personal representative under a decree of the court of probate must be reported to the court for confirmation. Until confirmed the sale is *in fieri*,—the highest bidder proposes to the court to buy the lands at a specified

[Lowe v. Guice.]

price, which the court may accept or reject.—*Hutton v. Williams*, 35 Ala. 503; *Fore v. McKenzie*, 58 Ala. 115. Upon the report of sale being made, the statute commands the court to examine it, and, if deemed necessary, to examine witnesses in relation thereto. If, on such examination, the court is satisfied that the sale was not fairly conducted, or that the amount bid is greatly less than the real value of the land, it is the duty of the court to vacate the sale and order a re-sale. But if the court is satisfied that the sale was fairly conducted, and the land is sold for an amount not greatly less than its real value, and the purchase-money is paid, if the sale is for cash, or sufficiently secured, if the sale is on credit, an order of confirmation must be made.—Code of 1876, §§ 2463–67. The order of confirmation is a decree of the court rendered on inquiry, all parties in interest having the opportunity of being heard, and of contesting or of supporting the sale. Such a decree rendered by a court of competent jurisdiction, especially a court of exclusive jurisdiction, in the absence of fraud, must be final and conclusive of all facts necessarily involved in its rendition, when not assailed on error or appeal in an appellate jurisdiction.

*Waring v. Lewis*, 53 Ala. 615. The single fact now relied on for the vacation of the sale is the fact the court of probate was bound to inquire into and determine before rendering the decree of confirmation. The decree of confirmation imports, that the court did inquire into and determine it—did examine, ascertain, and declare, that the lands were not sold for greatly less than their real value. The fact may be otherwise, but it is not open for contestation by the parties having the opportunity to be heard before the court, unless fraud could be charged to their adversaries in procuring the decree, or unless it was shown that the decree was the result of accident, without fault or negligence on their part. This court has inflexibly adhered to the principle, that unless facts or circumstances are shown, of which the party complaining could not have availed himself in the court of probate when the decree was rendered, facts or circumstances showing that the adjudication is inequitable, and that he is without fault or neglect, a court of equity can not re-open the litigation the decree is intended to close.—*Waring v. Lewis*, *supra*; *Otis v. Dargan*, 53 Ala. 178. In no case, after a sale has been confirmed by the court of probate, a stranger being the purchaser, in the absence of all facts and circumstances showing clearly that, without fault or neglect, the party complaining could not contest the confirmation in that court, will a court of equity intervene to vacate the sale. Inadequacy of price, however gross it may seem, there being an absence of all unfairness, and the parties interested not being



[Folmar v. Folmar.]

surprised, is not a ground upon which the court should intervene.—*Littell v. Zuntz*, 2 Ala. 256.

Whether, after the length of time intervening between the sale and its confirmation, and the filing of the present bill, and after the lands have been sold and passed into the possession of others, purchasers for value, the court would in any event interfere, is, to say the least, open to grave doubts. But in no aspect of the bill, is a case presented of which the court of chancery could take cognizance.

Affirmed.

## Folmar v. Folmar.

### *Bill in Equity for Divorce.*

1. *Divorce in favor of the wife; degrading charges against her, without violence, no ground for.*—Charges made by the husband against the wife, although degrading and humiliating in their character, are not, by themselves, sufficient to authorize a divorce, under section 2687 of the Code; but there must be actual violence inflicted on the person of the wife, attended with danger to her life or health, or such conduct on the part of the husband as generates a reasonable apprehension of such violence.

2. *Same; when insulting or offensive language competent evidence.*—If, however, in such case, there is proof of personal violence, actual or threatened, insulting or offensive language is competent evidence in aid of it.

3. *Presumption in favor of chancellor's conclusion on facts; when indulged in.*—Where there is a conflict in the testimony, the conclusion of the chancellor thereon will not be disturbed, unless this court is clearly convinced that such conclusion is erroneous.

APPEAL from Crenshaw Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed by the appellee, a married woman, by her next friend, against the appellant, her husband, for the purpose of obtaining a divorce from the bonds of matrimony under section 2687 of the Code of 1876. The facts are sufficiently stated in the opinion.

GAMBLE & PADGETT, for appellant.

GRIFFIN & WOOD, *contra*.

(No briefs came to the hands of the reporter.)  
VOL. LXIX.

[Folmar v. Folmar.]

STONE, J.—The present suit is an application by the wife to obtain a divorce from the bonds of matrimony, under § 2687 of the Code of 1876. We feel no disposition to collate the testimony. It presents a sad case of domestic infelicity, and a separation after long years of wedded life. The parties belong to the plain yeomanry of the country, and each, in turn, produces strong proof of good character. For the complainant, the proof is convincing that her character as an industrious, economical, virtuous, christian woman, is excellent. The husband has long entertained a morbid, and apparently unreasonable distrust of his wife's fidelity to him; a distrust, in which his best friends and nearest relations did not share. On the contrary, they believed his suspicions unfounded. Maddened by his jealousy, the defendant has, for years, made the life of his wife miserable, by the most degrading and humiliating charges against her of violation of the marriage vow; charges, calculated to shock all sense of decency. But such charges, by themselves, are not enough to authorize a divorce. There must be actual violence inflicted on the person of the wife, attended with danger to her life or health, or such conduct on the part of the husband as generates a reasonable apprehension of such violence. There being proof, however, of personal violence, actual or threatened, insulting or offensive language is received as evidence in aid of it.—1 Bishop Mar. and Div. §§ 722 [459], *et seq.*, Ed. of 1864; *King v. King*, 28 Ala. 315; *Reese v. Reese*, 23 Ala. 785; *David v. David*, 27 Ala. 222; *Smedley v. Smedley*, 30 Ala. 714; *Goodrich v. Goodrich*, 44 Ala. 670.

Mrs. Folmar makes some proof in this case of actual violence done her, and of a threat of violence by her husband. She testifies that her husband choked her and injured her, so that she suffered for some days; and that, at another time, he threatened to kick her.

Mr. Folmar testifies that he never struck his wife. The chancellor granted the divorce. In thus finding, he necessarily believed her statement. The testimony is not as full and satisfactory as we could desire, but we are not clearly convinced the chancellor erred in pronouncing on the testimony.—*Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387.

Affirmed.

## Winter v. Merrick & Sons.

### *Bill in Equity for an Equitable Attachment.*

1. *Allegata and probata must correspond.*—The rule prevails in both courts of law and equity, that the *allegata* and *probata* must substantially correspond. However cogent may be the proof, and however just may be the complainant's demand, no relief can be granted without the requisite allegations being made in the bill.

2. *Allegata and probata; when a fatal variance between.*—Where the complainant, a married woman, in a bill seeking an equitable attachment, alleges that the *whole* of the money sought to be recovered is *her* property, constituting a portion of her statutory separate estate, and the proof shows that she had only a *life interest* in the money, with *remainder* to her children, the variance between the allegations and proof is fatal.

3. *Same; under Code, bill amendable to cure variance, if claimed before decree.*—This court incline to the opinion that, under the present statute authorizing amendments (Code, § 3790), unlike the practice which formerly prevailed, such a variance between the allegations and proof may be cured by amendment, but the right to amend must be claimed in the court below before final decree dismissing the bill.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in this cause was filed on 6th December, 1870, by Mary E. Winter, a married woman, by her next friend, against Merrick & Sons and the Montgomery Gas Light Company, a body corporate, and sought, by an equitable attachment, to condemn a debt due from said corporation to Merrick & Sons, to the satisfaction of an alleged equitable demand which was held by complainant against Merrick & Sons. The opinion states as much of the case made by the record as is necessary to a proper understanding of the points decided therein.

DAVID CLOPTON and BRAGG & THORINGTON, for appellant.

W. A. GUNTER and H. C. SEMPLE, *contra*.

SOMERVILLE, J.—The decree of the chancellor, in this case, must be affirmed because of a fatal variance between the allegations of the bill and the proof disclosed in the record.

It is a rule prevailing in both courts of law and of equity that the *allegata* and *probata*—the matters *alleged* and those *proved*—must substantially correspond. However cogent may be the proof, and however just may be the demand of the complainant, no relief can be granted without the requisite allega-



[Hall v. Cook.]

tions being made in the bill.—*Flanagan v. State Bank*, 32 Ala. 508; *Cameron v. Abbott*, 30 Ala. 416; *O'Bannon v. Myer's Ex'rs*, 36 Ala. 551.

The allegation made in complainant's bill, as to her ownership of the money sought to be recovered of the defendants, is, that the *whole* of said money is *her* property, and constitutes a portion of her separate estate. The proof clearly shows that she had only a *life interest* in the money, or claim, and that the *remainder* went to her *children*.

This precise point has been twice ruled on by this court, and in both instances it was held to be a *variance*, and, under the old practice, not amendable.—*Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Larkins v. Biddle*, 21 Ala. 252.

We hold to the authority of these cases, so far as concerns the doctrine of variance, but incline to the opinion that the defect would be amendable under our present statute.—Code, 1876, § 3790; *Hinton v. Ins. Co.* 63 Ala. 488; *Jones v. Reese*, 65 Ala. 134.

However this may be, the right of amendment should have been claimed before final decree in the lower court.—*Brock v. S. & N. Ala. R. R. Co.* 65 Ala. 79. It may be that, had the chancellor granted the complainant relief and the case had been reversed here for this defect, we might have remanded the cause so as to afford an opportunity of amendment. But the rule is different where the bill is dismissed by the lower court, except, perhaps, where the bill has equity, and the dismissal is for want of proper parties, in the absence of a demurrer on this ground.—*Stone v. Hale*, 17 Ala. 557. This is not, however, a question of parties, but a matter of variance in the *title* as alleged in the bill and that disclosed in the proof, which are essentially different. There are other grounds which would also justify the affirmance of the chancellor's decree, but it is unnecessary that we should consider them.

Affirmed.

STONE, J., not sitting.

## Hall v. Cook.

### *Assumpsit.*

1. *Partnership; contracts joint and several.*—Under the statutes of this State, the promises, contracts and obligations of partnerships, whether written or verbal, given within the scope of the partnership dealings, are the promises, contracts and obligations of the partnership, and of each and every member thereof.

[Hall v. Cook.]

2. *Same; members of may be sued as individuals.*—A creditor may sue one or all the members of a partnership, on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued.

APPEAL from DeKalb Circuit Court.

Tried before Hon. L. F. Box.

This was a suit by Bolivar H. Cooke against Oliver L. Hall, Alexander H. Mackey and Luther C. Hall, on an account for goods, wares and merchandise sold and delivered to the defendants by the plaintiff, and was tried on the plea of the general issue. On the trial the depositions of the plaintiff and another witness examined on his behalf, taken upon interrogatories, were offered in evidence by the plaintiff. In the interrogatories propounded to the plaintiff, he was asked, whether there was any thing due to him from Hall, Mackey & Co., and if so, how much, and for what it was due. To this question he answered, in substance, that they owed him \$140.50 for goods sold and delivered to them by him. To the question and answer the defendants objected, on the ground that the question "called for an indebtedness due from Hall, Mackey & Co., and the answer purported to prove an account due from Hall, Mackey & Co., and not these defendants," and that, therefore, there was a variance between the proof offered and the allegations of the complaint. On the statement of the plaintiff, that he would show that the defendants were members of the firm of Hall, Mackey & Co., the court overruled the defendants' objection and allowed the answer to be read to the jury, and the defendants excepted. Other objections of like character were made by the defendants to other interrogatories propounded to the plaintiff and the other witness, and their answers thereto, which were also overruled by the court, and exceptions reserved to the rulings of the court thereon by the defendants. The plaintiff afterwards proved that his attorney presented the claim sued on to the defendants, "who were members of the firm of Hall, Mackey & Co., and they each admitted the justness of the amount of the claim." The depositions read in evidence also tended to prove the correctness of the account sued on. The defendants offered no evidence. The court charged the jury at the request of the plaintiff in writing, that it was sufficient if the evidence showed that the defendants were members of the firm of Hall, Mackey & Co. To the giving of this charge the defendants excepted. The giving of this charge and the rulings of the Circuit Court on the evidence are here assigned as error.

McSPADDEN & CARDON, for appellants.

VOL. LXIX.

[Hundley v. Yonge.]

L. A. DOBBS and DUNLAP & DORTCH, *contra*.

STONE, J.—Under our statute, Code of 1876, § 2904, when there are “two or more persons associated together as partners in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, . . . any one of the associates, or his legal representative may be sued for the obligation of all.” The effect of our statutes is to make the promises, contracts and obligations of partnerships, given within the scope of their partnership dealings, the promises, contracts and obligations of the partnership, and of each and every member thereof. The contract itself makes it joint, and our statute makes it also several. This, because when the promise is given, or obligation entered into within the scope of the partnership dealings, it is alike the contract or obligation of all, and of each member of the firm. Such promise need not be in writing, unless it is of the nature which the law requires to be in writing. And joint contracts may be made, with or without writing. In *McCulloch v. Judd*, 20 Ala. 703, it was said: “A creditor may sue one or all the members of a firm, on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued.”

We find no error in this record, and the judgment of the Circuit Court is affirmed.

## Hundley v. Yonge.

### *Action at Law to enforce Mechanic's Lien.*

1. *New trial; when motion must be made and acted on.*—Unless it appears affirmatively from the record, that a motion for a new trial was made, called to the attention of the court and specially continued during the term at which judgment was rendered, the court has no power to entertain it at a subsequent term.

2. *Same; when it may be heard at adjourned term.*—At an adjourned term under the statute, no limitation as to business having been prescribed in the order of adjournment, the circuit court has the same authority and jurisdiction as it had at the regular term, of which the adjourned term is a mere continuation; and hence, it may hear and grant a motion for a new trial made at the regular term, although the motion had not been specially continued.

3. *Same; grant on conditions to be performed in vacation.*—The granting of new trials on terms and conditions to be performed in vacation, has prevailed too long to be now questioned.



[Hundley v. Yonge.]

APPEAL from Lee Circuit Court.

Tried before Hon. JAMES E. COBB.

This action was brought by A. M. Hundley against W. P. Yonge and his wife to enforce a mechanic's lien for work and labor done by the plaintiff in building a mill on the lands of Mrs. Yonge. A demurrer to the complaint having been sustained by the court, the plaintiff filed an amended complaint, to which the defendants interposed a demurrer, which was also sustained by the court. Numerous grounds of demurrer were assigned to the original and amended complaints, but as the averments of both show that the plaintiff's claim did not come within the statute creating the lien, it would serve no good purpose to set them out at length. At the Spring Term, 1877, the defendants failing to appear, a judgment by default was rendered against them. Subsequently, at the same term, the defendants filed a motion for a new trial; and on the last day of the term an order was entered, reciting that the presiding judge had failed to dispose of the business of the term, and adjourning the court until the 16th day of July, 1877, without prescribing any limitation as to the business to be transacted at the adjourned term. No order was made specially continuing the defendants' motion for a new trial. At the adjourned term the motion was heard and granted on condition that the defendants should pay the costs of the suit and of the motion within ninety days from the date the motion was granted. To this ruling of the court the plaintiff excepted. The plaintiff declining to further amend his complaint, judgment final was rendered on the demurrer for the defendants, from which this appeal was taken.

The rulings of the Circuit Court above noted are here assigned as error.

H. C. LINDSEY, for appellant.

G. D. & G. W. HOOPER, *contra*.

BRICKELL, C. J.—The term of the court is the limit within which the power to grant new trials may be exercised, unless the application is for a rehearing founded on the statutes.—Code of 1876, §§ 3159–3171. But if during the term at which the judgment is rendered, a motion for a new trial is made and continued, the court may at a subsequent term hear and decide it.—2 Brick. Dig. 276, §§ 3–4. Such motions are not, however, like causes pending in the court in which no final action is had, continued by operation of law, if not decided at the term at which they are made; nor are they kept alive by the mere general order of continuance *of all causes and motions not*

[Crumley Bros. v. Bryan &amp; Co.]

*otherwise disposed of*, which it is the practice of the court to enter at the close of each term. Unless it appears affirmatively from the record that the motion was made and called to the attention of the court during the term at which judgment was rendered, and by the court continued, it is without vitality at a subsequent term, and the court has not power to entertain it. *Gunnells v. State Bank*, 18 Ala. 676. In this case the motion for a new trial was regularly entered at the term at which judgment was rendered. The court did not adjourn *sine die*, or to the next regular term, but to a day intervening. The adjournment was authorized by the statute.—Code of 1876, § 654. The adjourned term was a mere continuation of the regular term, and over all matters not disposed of at some former term, the court had full authority; the authority and jurisdiction it would have had if there had not been an adjournment; the particular business to be transacted at the adjourned term not being prescribed in the order of adjournment.—*Van Dyke v. The State*, 22 Ala. 57. The only limitation prescribed as to the business to be transacted at the adjourned term was as to criminal, not civil causes; and all civil business was therefore in the power and jurisdiction of the court at the adjourned term. The court was not without the power to hear the motion for a new trial, and granting or refusing it was a matter of discretion not revisable. The granting of new trials on terms and conditions to be performed in vacation, has prevailed too long for us now to question it. *Edwards v. Lewis*, 18 Ala. 494; *Ex parte Lowe*, 20 Ala. 220; *Ex parte Jones*, 35 Ala. 706.

The complaint, original and amended, is clearly obnoxious to several of the causes of demurrer assigned. It does not aver a state of facts upon which a statutory lien on the lands described, capable of enforcement by action at law, would exist in favor of the plaintiff.

Affirmed.

## **Crumley Bros. v. Bryan & Co.; and Crumley Bros. v. Winter & Co.**

1. *Appeal from interlocutory rulings of circuit court; can not be taken without consent of opposite party.*—Section 3917 of the Code of 1876 authorizes appeals from the interlocutory rulings of the circuit court therein enumerated, to be prosecuted only on the condition precedent that “the consent of the opposite party, or his attorney is obtained to its being taken.” An appeal taken from such rulings without the consent of the opposite party or his attorney, must be dismissed for want of jurisdiction in this court.

[Vaughan v. Smith.]

APPEAL from Lee Circuit Court.  
Tried before Hon. HENRY D. CLAYTON.

J. M. CHILTON, for appellant.

W. H. BARNES & SON, *contra*.

SOMERVILLE, J.—Each of these appeals is taken from a judgment of the circuit court overruling a motion to “dismiss” or “discharge” the levy of an attachment on certain goods of the defendants, and from a judgment sustaining a demurrer to a plea in abatement to the attachment in each case.

If we regard the motion as equivalently one to dismiss or quash, the appeals must be dismissed for want of jurisdiction in this court, on the ground that the statute authorizes an appeal from such interlocutory rulings to the circuit court to be prosecuted only on the condition precedent, that “*the consent of the opposite party, or his attorney* is obtained to its being taken.”—Code, 1876, § 3917.

There is no such consent shown by the record, and the judgment is, therefore, that the appeal be dismissed.

## Vaughan v. Smith.

### *Bill in Equity to Enforce Vendor's Lien on Lands.*

1. *Hearing before cause at issue; when not an error available on appeal.* While it is erroneous to proceed in a court of equity to the taking of testimony, and to a hearing before the cause is at issue as to one of the defendants; yet, if this error is committed through the complainant's fault, it will not be available to him in this court on an appeal taken by him.

2. *Register's report; when he need not report evidence taken before him.* Under a decree of reference directing an account, and that the register report his conclusions upon the matters of fact referred to him for ascertainment, such conclusions form the only proper subject-matter of his report; and it is not his duty to report the oral evidence taken before him on the reference and reduced to writing, or the facts shown thereby, from which his conclusions were drawn.

3. *Exception to register's report; its office.*—The appropriate function of an exception to a register's report, is to point out distinctly and clearly the error, or matter complained of as error. A mere general objection to the rulings or conclusions of the register, or to the results attained by him in the statement of an account, can not be entertained.

4. *Same; failure to note evidence relied on; its effect.*—Where a party has failed to note at the foot of an exception taken by him to a conclusion of fact reported by a register, the evidence or parts of evidence on which he relies to support his exception, under the 93d Rule of Chancery Practice, the exception should be overruled.



[Vaughan v. Smith.]

5. *Register's report; when should not be disturbed.*—Where the conclusions of the register are drawn not only from depositions, but also from the oral examination of witnesses before him, the same weight and effect ought to be accorded to his findings as would be given to the verdict of a jury. If from the whole evidence it be a matter of reasonable doubt whether his findings are correct, they should not be disturbed.

6. *Computation of interest; the statute furnishes the only rule.*—Where partial payments have been made, the statute furnishes the only rule which can be recognized for the computation of interest,—the interest due is first to be paid, and the balance applied to the payment of the principal. (Code of 1876, § 2091.)

Appeal from Tallapoosa Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by the appellant against George W. Smith, George M. Gamble and another, the appellees, for the purpose of enforcing a vendor's lien on certain lands, which Gamble sold to Smith for ten bales of cotton, for the delivery of which he took Smith's two written obligations, one for the delivery of five bales on 25th December, 1869, and the other for the delivery of five bales on 25th December, 1870. Gamble reserved the title to the lands, and only executed to Smith his bond for title on the delivery of the cotton. Several years after the maturity of the obligations Gamble assigned them to the appellant. Gamble failed to appear, and no decree *pro confesso* was taken against him. Smith and the other appellee, who was a sub-purchaser under Smith, answered insisting that the purchase-money had been fully paid. On the hearing a decree of reference was entered, the provisions of which, as well as the other facts in the case, are sufficiently stated in the opinion.

JOHN A. TERRELL, for appellant.

W. D. BULGER, *contra*.

BRICKELL, C. J.—It was erroneous to proceed to the taking of testimony, and to a hearing, without the cause being at issue as to the respondent Gamble. The error was committed through the fault of the appellant, is not of injury to him, and is not available to reverse the decree at his instance.

There was a reference to the register, to ascertain what balance, if any, was unpaid on the contracts for the delivery of the cotton as the price of the lands. The register was instructed on the reference, to consider the testimony on file, "and all competent and legal evidence, whether oral or written, that may be offered by either party, tending to ascertain the amount and dates of all payments made by said Smith, and received by said Gamble or the complainant on said notes," and to report

[Vaughan v. Smith.]

“his conclusions and rulings, and the evidence on said rulings.” The reference was had, witnesses were examined orally before the register, and he reported as his finding and conclusion from all the evidence, that there was an unpaid balance on the contracts of one hundred and six 5-100 dollars. The complainant excepted to the report because the register did not adopt and pursue the statutory mode of computing interest—did not, when the partial payments were sufficient, apply them first to the payment of interest, but computed interest on such payments from the time they were made to the taking of the account. The appellee, Smith, filed several exceptions to the conclusions and rulings of the register, but not accompanied with any note of the evidence or parts of the evidence relied upon to support them. On the exceptions the cause was heard by the chancellor, and without passing upon them, or reviewing the evidence, he reached the conclusion that the contracts had been fully paid, and a decree was rendered dismissing the bill.

The register was required to report only his conclusions upon the matters of fact referred to him for ascertainment. The oral evidence taken before him and reduced to writing, it was not his duty to report; nor was it his duty to report the facts of it, from which his conclusions were drawn. The conclusions reached by him formed the only proper subject-matter of the report, and this, with a statement of the account between the parties, is embodied in the report.—*Kirkman v. Vanlier*, 7 Ala. 217; *Mahone v. Williams*, 39 Ala. 202. The appropriate function of an exception to a register's report is to point out distinctly and clearly the error, or matter complained of as error. A mere general objection to the rulings or conclusions of the register, or to the results he may reach in the statement of an account, can not be entertained.—*Alexander v. Alexander*, 8 Ala. 796; *O'Reilly v. Brady*, 28 Ala. 530. The present rule of practice requires, that when exceptions are taken to conclusions of fact drawn by a register, the party excepting shall note at the foot of each exception the evidence or parts of evidence relied upon to support the exception, and the opposite party may note such of the evidence as he deems material to the inquiry. No other parts of the evidence than such as are there noted, come necessarily before the chancellor.—Rule 93 Ch. Pr., Code of 1876, p. 174. The exceptions to the report of the register filed by the appellees, were too general, and were not accompanied by a note of the evidence in support of them. There was no event in which they could have been sustained, and they should have been overruled.

The exceptions of the complainant ought to have been sustained, and so the chancellor decreed. The error in the com-

[Vaughan v. Smith.]

putation of interest was apparent on the face of the report. The statute furnishes the only rule which can be recognized for the computation of interest, where partial payments are made,—the interest due is first to be paid, and the balance applied to the payment of the principal.—Code of 1876, § 2091.

The register on the reference and in the report followed the instructions in the decree of reference. The only error apparent on the face of the report is in the computation, or rather the mode of computing interest adopted by the register. The exceptions taken by the appellees were insufficient to bring before the chancellor the matters referred to in them. If it were proper, in this condition of the cause, for the chancellor to inquire into the findings of the register upon the questions of fact referred to him, all reasonable presumptions ought to have been indulged to support them. These conclusions were drawn not only from depositions, but from the oral examination of witnesses, and the weight and effect ought to have been accorded to the findings of the register which would have been given to the verdict of a jury. If from the whole evidence it be matter of reasonable doubt, whether the findings are correct; if there be evidence supporting them, and from the evidence different persons equally impartial and intelligent might entertain different opinions, the findings ought not to have been disturbed.—*Kinsey v. Kinsey*, 37 Ala 393; *Mahone v. Williams*, 39 Ala. 202. In *Harding v. Handy*, 11 Wheaton, 126, cited approvingly in *Mahone v. Williams*, *supra*, it was said by MARSHALL, C. J.: "It may be observed generally that it is not the province of a court to investigate items of an account. The report of the master is received as true when no exception is taken; and the exceptions are to be regarded, so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court, by a reference to the particular testimony on which the exceptor relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail. Such testimony, indeed, need not be reported further than it is relied on to support, explain, or oppose a particular exception." The conclusions of the register, that a balance of the purchase-money of the lands remained unpaid, are not wholly unsupported by the evidence, and there was no sufficient reason for disregarding them, if, in the absence of exceptions, they could have been reviewed. The chancellor ought to have accepted them as correct and rendered a decree in conformity to them.

The decree is reversed and the proper decree will be here rendered.



**Farrow v. Andrews & Co.***Action on Promissory Note.*

1. *No implied warranty in sale of guano by one who is not the manufacturer.*—There is no implied warranty in the sale of guano by one who is not shown to have manufactured it, that it was reasonably well adapted to the purposes for which it was purchased; but in such a sale, like that of any other merchandise, the law exacts from the seller only good faith and fair dealing.

2. *Expression of opinion not a warranty.*—The mere expression of an opinion by one selling guano, that it was a good fertilizer, does not amount to a warranty.

3. *Plea raising immaterial issue; when evidence in support of should be received.*—Where issue is joined on an insufficient plea, it becomes one of the issues to be tried by the jury, and, although it is immaterial, the court has no discretion, but must receive evidence offered in support of the averments of the plea.

APPEAL from Randolph Circuit Court.

Tried before Hon. JAMES E. COBB.

This action was brought by the appellees against the appellant, and was founded on a promissory note, executed by the latter to the former. In addition to the plea set out in the opinion, the appellant pleaded the general issue, and also, by way of set-off, damages which, it is alleged, he sustained on account of a breach of a warranty in the sale by the appellees to the appellant of a lot of guano, which they "warranted to be good guano, when in fact and in truth the said guano was wholly worthless and of no value." On the trial it was shown that the note sued on was executed by the appellant to the appellees in consideration of certain guano which he purchased from them. It was not shown that the appellees manufactured the guano. The appellant, "for the purpose of showing a want of consideration in the note sued on," offered proof tending to show that the guano so purchased by him was worthless and of no value; but, on the objection of the appellees, the court refused to allow the appellant to make the offered proof, and he excepted. The evidence also tended to show, that the guano was sold by an agent, and that this agent told appellant, at the time of the sale, that the appellees had instructed him to say to purchasers, that they believed it was good. It was also shown that the appellees had expressly instructed this agent not to warrant the guano sold by him for them. The court charged the jury in writing, at the request of the appellees,

[Farrow v. Andrews &amp; Co.]

that if they believed all the evidence, they must find for them to which charge the appellant excepted. There was a verdict for the appellees, on which a judgment was rendered in their favor. The rulings of the Circuit Court above noted are here assigned, among others, as error.

SMITH & SMITH, for appellant, cited *Gammell v. Gunby*, 52 Ga. 504; *Sims v. Howell*, 49 Ga. 62; *Jones v. Bright*, 5 Bing. 533; *Brown v. Edington*, 2 Man. & G. 279; *Groma v. Atlantic Railway Co.*, 58 N. Y. 358.

ROBINSON & DENSON, *contra*. (No brief came to hands of reporter.)

STONE, J.—It is not shown in this record that Andrews & Co., the sellers of the guano, were themselves its manufacturers. Hence there was no implied warranty that the article sold was reasonably well adapted to the purposes for which it was purchased. Like any other sale of merchandise, the law exacted from the contractors only good faith and fair dealing. Neither do we think there was any evidence given or offered, tending to prove a warranty. The most that can be made of it is an expression of opinion that it was a good fertilizer. This does not amount to a warranty.—*Wilcox v. Henderson*, 64 Ala. 535.

There is a point, however, on which we feel it our duty to reverse several rulings of the Circuit Court. One of the pleas of defendant is in the following language: "That the note sued on was given by the defendant for guano, which said guano was wholly worthless and of no value, and the said note has no other consideration than the said worthless guano sold by the plaintiff to the defendant." This plea was not demurred to, but the record informs us, issue was joined upon it. Now, although the plea was insufficient, yet when issue was joined upon it, it became one of the issues to be tried by the jury, and the defendant should have been allowed to introduce testimony in support of it. The plea consisted of two averments, and so long as it remained as the basis of one of the issues, although immaterial, the court had no discretion, but should have received the evidence offered in support of each of the averments of the plea, namely: that guano was the consideration of the note, and that the guano was worthless.—*Mudge v. Treat*, 57 Ala. 1. Several rulings of the Circuit Court are opposed to these views.

Reversed and remanded.

## Moog v. Strang.

*Bill in Equity to have Mortgage Canceled on the ground of Fraud or Undue Influence.*

1. *Contracts; When void as against public policy.*—All agreements, express or implied, the consideration of which is the compounding of a felony, or the suppression of a prosecution for a criminal offense, strictly public in its character, are illegal and void as against public policy.

2. *Same; when not affected by motives of parties.*—Where a crime has been committed, creating a civil liability against the offender, and a settlement of such civil liability is made between the parties in interest, the motives prompting them to make the settlement, however reprehensible they may be, are not cognizable by the courts, so long as the minds of the parties fall short of concurring in an *agreement*, express or implied, to compound, or not to prosecute the crime, as the consideration, in part or in whole, of the payment of the debt or damages resulting from the commission of the offense.

3. *Mortgage; when does not contravene public policy.*—A mortgage executed to secure a note made by a cashier of a bank who had defaulted to a surety on his bond as such cashier, for an amount paid for him by the surety in settlement of the civil liability growing out of the defalcation, there being no agreement not to prosecute the cashier criminally, is not illegal and void as against public policy.

4. *Same; its validity as affected by undue influence.*—The validity of a conveyance is not affected by the fact that its execution was procured by the exercise of undue influence, if the grantee, being a purchaser for value, did not participate in, or have notice of the wrongful act.

5. *Acknowledgment of mortgage; its effect when attacked for fraud.* Where a mortgage is duly acknowledged before, and certified by a proper officer, in the form prescribed by the statute, this is, in itself, cogent proof of a free agency and absence of restraint in the execution of the mortgage, and raises a presumption in favor of its validity, which can only be rebutted by clear proof of fraud, duress, or imposition practiced on the mortgagor, in which the officer or mortgagee participated.

6. *Statute of frauds; when mortgage not affected by.*—Where a mortgage executed to secure the debt of another, for which the mortgagor was in no way liable, contained an obligation on the part of the mortgagee to insure the mortgaged premises for two years, this fulfills the requirement of the statute, that the consideration should be expressed in writing. (Code, 1876, § 2121.)

APPEAL from Mobile Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The facts are stated in the opinion.

J. L. & J. G. SMITH, for appellant.—(1.) It was legal for Moog to compromise his civil liability as surety for Hubbard, provided he was not intentionally instrumental in stopping the proceedings set on foot by the bank, and provided such stop-



[Moog v. Strang.]

page formed no part of the compromise. This legal act can not be vitiated, because Mrs. Strang's chief motive may have been the compounding, or because the bank may have chosen to drop its intended criminal proceedings as a mere incident to the recovery of its money.—*Harding v. Hooper*, 1 Stark. 467; *McClintick v. Cummins*, 3 McLean, 160. Such a transaction was lawful. The necessity for it grew out of an illegal act, but it in no way contributed to the furtherance of the illegal act, out of which it arose.—*Scheible v. Bucho*, 41 Ala. 439, and cases cited; *Hughes v. Young*, 25 Ala. 483; *Quirk v. Thomas*, 6 Mich. 76; *Lea, Adm'r v. Cassen*, 61 Ala. 312. (2.) Mrs. Strang was *in pari delicto*, and she, therefore, can not obtain the relief sought.—*Collins v. Blantern*, 2 Wilson, 347; 1 Story's Eq. Juris. §§ 296, 300; *Thomas v. Cronise*, 16 Ohio, 54; *Raguet v. Roll*, 7 Ohio, 401; *Sharp v. Taylor*, 2 Phillip Ch. R. 801; *Lea, Adm'r v. Cassen*, 61 Ala. 315; *Swatzer v. Gillett*, 1 Chand. (Wis.) 208; 25 Md. 446; 11 Mass. 368; 3 Stock. 552. (3.) The mortgage was not executed by Mrs. Strang while under *duress per minas*.—*Hatter's Ex'rs v. Greenlee*, 1 Port. 222; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *Rood v. Winslow*, 2 Doug. (Mich.) 68; *Plant v. Gunn*, 2 Woods, 376; *Eddy v. Herrin*, 17 Me. 338; *Hackett v. King*, 6 Allen, 58; *Crowell v. Gleason*, 1 Fairfield, 325; *Watkins v. Baird*, 6 Mass. 506; 1 Pars. on Con. m. p. 393 and note. (4.) Moog paid a valuable consideration for the mortgage, and any undue influence exerted by Mrs. Strang's own family, without his procurement, consent or knowledge, can not affect his rights.—*Moses v. Dade*, 58 Ala. 211; *Rogers v. Adams*, 66 Ala. 600. (5.) Mrs. Strang is estopped by her acknowledgment of the mortgage, from denying her volition in its execution.—*Miller v. Marx*, 55 Ala. 322; *Cahall & Pond v. C. M. B. A.*, 61 Ala. 246. (6.) The mortgage not within the statute of frauds.—*McKenzie v. Jackson*, 4 Ala. 233; *Martin v. Black's Ex'rs*, 21 Ala. 721; Brant on Suretyship, §§ 6 & 7; *Newberry v. Armstrong*, Moo. & M. 389; *Hawes v. Armstrong*, 1 Bing. N. R. 761; *Kennaway v. Treleavan*, 5 Meas. & W. 498; *Adams v. McMillan, Ex'r*, 7 Port. 73; *McQuaid v. Powers*, 46 Ala. 52; Browne on Stat. of Frauds, § 405; 1 Brick. Dig., p. 382, § 114; *Whiteside v. Jennings*, 19 Ala. 784. The statute applies to an executory agreement, not to an executed contract.—*Gafford v. Stearns*, 51 Ala. 444. A mortgage is not an executory agreement.—*Purcell's Adm'r. v. Mather*, 35 Ala. 570; *Love v. Crook*, 27 Ala. 628; *Watrous v. Chalker*, 7 Conn. 224; *Welsh v. Phillips*, 54 Ala. 309; *Toomer v. Randolph*, 60 Ala. 356.

HANNIS TAYLOR, *contra*.—(1.) The case presented is not a case of *duress per minas*. It is a case of undue influence, in

[Moog v. Strang.]

which a court or equity is asked to intervene for the protection of a feeble old woman, mentally infirm, against the results of the most unconscionable oppression.—Story's Eq. Jur. §§ 234–237; *Osgood v. Franklin*, 2 John. Ch. R. 1. (2.) The law denounces as illegal all contracts based upon the suppression of a criminal prosecution.—*Town of Sharon v. Gager*, 46 Conn. 189; *McMahon v. Smith*, 47 Conn. 223; 6 Wis. 42; 3 Cush. 454; 9 Vermont, 23, 28, 308; 30 Me. 105; 9 N. Hamp. 197. (3.) The complainant's case is not within the influence of the doctrine of *in pari delicto*.—2 Story's Eq. Jur. § 695 a; 1 Story's Eq., § 300; *Basanquet v. Dashwood*, Cas. T. Talbot, 37, 40, 41; 2 Ves. 156; 18 Ves. 379; Adam's Eq. (3d Am. Ed.) p. 419. (4.) The mortgage is voidable under statute of frauds.—*Rigby v. Norwood*, 34 Ala. 129. The mortgage an executory contract.—*Denton v. English*, 10 Am. Decisions, 639; 1 Powell on Con. 234; Pars. on Con. 58, note, y.

SOMERVILLE, J.—The bill in this case was filed by the appellee, Julia A. Strang, for the purpose of cancelling a mortgage executed by her to the appellant, Moog, on certain real estate owned by her in the city of Mobile, of which she was at the time in possession. The debt secured by the mortgage was due, not by the mortgagor, but by her son-in-law, one Hubbard, and was evidenced by his promissory note payable to the mortgagee, Moog. The consideration of the note was money advanced by Moog, at the request of Mrs. Strang, to Hubbard, which was paid by the latter to the National Commercial Bank of Mobile, in part compromise of a large pecuniary liability created by his own defalcation as cashier of the bank. The appellant was surety on Hubbard's bond, and himself paid half of the sum agreed to be received by the bank.

It is contended by appellee's counsel, in the first place, that the sole and only consideration for the execution of the mortgage was the illegal suppression of a criminal prosecution inaugurated against Hubbard by the bank, charging him with the embezzlement of its funds. There can be no doubt of the soundness of the proposition of law contended for in this regard. All agreements are unquestionably illegal and void, as against the public policy, the consideration of which is the compounding of a felony, or the suppression of a prosecution for a criminal offense, strictly public in its character. Whether such agreement is express or implied, it is fatally void, and its enforcement will not be countenanced by the courts.—Chitty, Cont. (11th Amer. Ed.) 991; 1 Add. Cont. § 258.

The facts of the present case, in our opinion, fall very far short of proving any such agreement, either directly or by implication. It is true, as the record shows, that the bank officers

[Moog v. Strang.]

had employed attorneys to inaugurate a prosecution against Hubbard, and some steps were taken in that direction. It further appears that, after the compromise by Hubbard and Moog of the civil liability of the former created by the alleged embezzlement, the prosecution was carried no further by the bank. This fact alone might create some suspicion of an agreement to stifle the prosecution, but even this mere cloud of a suspicion is entirely dissipated by the evidence. There is not only no proof of such an agreement, but affirmative proof that there was no agreement on the subject whatever, either express or implied. The bank was under no legal compulsion to prosecute. Like a natural person, it could elect to do so or not. The law does not undertake to imperatively control the exercise of this power of election or legal option, but it merely forbids all *agreements* between the parties, stipulating to influence it, by stamping them with the vice of invalidity. Nor does it any more seek to control the hope or expectations of the offender. He may very reasonably, in many cases, expect that the prompt settlement of a discovered defalcation may tend to paralyze the energy of an incipient prosecution, and, however reprehensible the motives of the parties, they are not cognizable by the courts so long as their minds fall short of concurring in an agreement, express or implied, to compound or not to prosecute, as the consideration, in part or in whole, of the payment of the debt or damages resulting from the crime committed. The application of these principles leads us to the necessary conclusion, that there can be no illegality in the consideration of the mortgage executed by the appellee, Mrs. Strang.—*McClintick v. Cummins*, 3 McLean, 160; *McMahon v. Smith*, [47 Conn. 221] 36 Amer. Rep. 67; *Peed v. McKee*, [42 Iowa, 689] 20 Amer. Rep. 631; *Partridge v. Hood*, [120 Mass. 403] 21 Am. Rep. 524; 1 Bouv. L. Dit. title, "*Compounding a felony*;" Chitty on Contr. (11 Amer. Ed.) 991-2.

The second ground upon which the validity of the mortgage is assailed, is that of duress, in the nature of undue influence, alleged to have been exercised upon the maker of the instrument in procuring its execution. Conceding that Mrs. Strang acted under circumstances of extreme distress or necessity, superinduced by the apprehended prosecution, such as to overcome her free agency—a conclusion we would scarcely feel authorized intelligibly to draw from the evidence—it is manifest that none of these influences of duress were exerted upon her by the agency of Moog, the appellant. If morally she was put *in vinculis*, it was through undue sympathy, fear and restraint excited by members of her own household, who were eager to save a husband or kinsman from the disgrace of an exposure or conviction, which would bring with it attendant evils griev-



[Moog v. Strang.]

ously affecting their own social well-being. With these agencies of undue influence, if any, there is no testimony showing Moog's complicity or connection in any manner. He himself testifies that he was ignorant of the fact that any prosecution was threatened until after the mortgage was executed, and there is no one to gainsay his assertion. When an instrument is procured to be executed under the influence of duress of this nature, and the mortgagee, or other purchaser for valuable consideration, does not participate in the wrongful act, and has no notice of it, the validity of the instrument is in no wise affected or vitiated. This proposition is too well settled by this court, and generally by authority, for further discussion.—*Rogers v. Adams*, 66 Ala. 600; *Moses v. Dade*, 58 Ala. 211; *Schrader v. Decker*, 9 Penn. St. 14; *Green v. Scranage*, 19 Iowa, 461; *Talley v. Robinson*, 22 Gratt. (Va.) 888.

The mortgagor, furthermore, in this case, duly acknowledged before a proper officer, that she voluntarily executed the instrument, and the officer attaches the usual certificate of acknowledgment in the form prescribed by statute. This circumstance is in itself cogent proof of a free agency and absence of restraint in the execution of the mortgage, and raises a presumption in favor of its validity, which can only be rebutted by clear proof of fraud, duress or imposition practised on the mortgagor, in which the officer or mortgagee participated.—*Miller v. Marx*, 55 Ala. 322; *Graham v. Anderson*, 42 Ill. 514; *Fosdick v. Risk*, 15 Ohio, 84; *Morris v. Sargent*, 18 Iowa, 90.

The mortgage in question was very clearly not within the operation of the statute of frauds. If it be regarded, in any sense, as an executory and not an executed agreement, it fulfilled with certainty the requirements of the statute, that the *consideration* should be expressed in writing.—Code, 1876, § 2121. The obligation assumed by Moog to insure the mortgaged property for the space of two years, was both beneficial to the promisee and prejudicial to the promisor, and is expressed as a part of the consideration of the mortgage. This was clearly sufficient, leaving out of view the further recitals in the mortgage, which make it apparent that the money advanced Hubbard was really paid at the request of Mrs. Strang, the mortgagor.—*Martin v. Black's Ex'rs*, 21 Ala. 721; *Rigby v. Norwood*, 34 Ala. 129; Browne on Stat. Fr. § 405.

The decree of the chancellor granting relief to the complainant was erroneous and must be reversed, which is hereby accordingly ordered, and a decree is here rendered dismissing the bill.

[Childers v. The City of Greenville.]

## Childers v. The City of Greenville.

### *Statutory Action by Material-man to Enforce Lien.*

1. *Statutory lien of material-man; its extent when materials furnished to the contractor.*—Under the statute giving a lien to mechanics, employees and material-men (Code, §§ 3440-3461), the lien of a material-man for supplies furnished by him under a contract, not with the owner or proprietor, but with the contractor who, under his contract, was to supply the proper materials; exists only when there is a balance due from the owner or proprietor to the contractor, and extends only to such balance.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This action was commenced on the 1st of January, 1881, and was brought by A. F. Childers against J. M. Ford and the City of Greenville, under the statute, to enforce an alleged lien on a certain building in said city, for the construction of which, and for the materials to be used therein, the city had contracted with Ford, for the value of materials which the plaintiff had furnished Ford to be used, and which had been used, in the construction of said building. The evidence on the trial showed, that at the time plaintiff gave the city the notice of the filing of his claim which is required by section 3457 of the Code, the city did not owe, nor did it afterwards owe, Ford anything under his contract for the construction of said building. On the written request of said city, the court charged the jury, that if they believed the evidence they must find for it; and to the giving of this charge the plaintiff excepted, and here assigns the same as error.

J. C. RICHARDSON, for appellant.

GAMBLE & BOLLING, *contra*.

BRICKELL, C. J.—The present action is founded on the theory that a lien had attached to the building which was in course of construction for the value of the brick the appellant had sold to Ford, with whom the appellee had contracted for the erection of the building, and who was to supply the proper material. The lien exists in such case only when there is a balance due from the proprietor to the contractor, and extends only to such balance.—*Geiger v. Hussey*, 63 Ala. 338. The evidence showing clearly, and being undisputed, that there was

[Weems v. Weems.]

no amount due from the city to Ford, on account of the contract for the construction of the building, the Circuit Court properly instructed the jury to find for the defendant.

Affirmed.

## Weems v. Weems.

### *Action on Account.*

1. *Bill of exceptions; its office, and what it should contain.*—The object of a bill of exceptions is to make the record speak what would not otherwise appear, touching any “charge, opinion or decision” of the court, in which the court is supposed to have erred, to the prejudice of the party complaining; but it should not contain “the process, pleadings or judgment of the court, as these are parts of every record and do otherwise appear. The bill should also be signed by the presiding judge in such manner as to show that it was intended as a bill of exceptions.

2. *What is not a bill of exceptions.*—Where the caption of a record sent to this court on appeal, after stating the style of the case, the term of the court, and the name of the presiding judge, is in these words: “On the trial of this cause the following proceedings were had”; and then follow a motion to have counsel assigned to defend for the defendant, who was a *non compos*, the assignment of counsel, and then the process, pleadings and judgment-entry and the other proceedings in the cause, in consecutive order; to which is added the following words: “And the defendant’s attorneys now assign each and all of the said rulings of the court as errors. (Signed) Wm. L. Whitlock,”—*held*, that this can not be regarded as a bill of exceptions, as it fails to express directly, or by implication, that it was so intended.

3. *Demurrer to entire complaint; when should be overruled.*—A demurrer to an entire complaint, consisting of two or more counts, should be overruled, if any one of the counts is sufficient.

### APPEAL from Cherokee Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was an action of *assumpsit* by Asa Weems, the appellee, against Joel Weems, the appellant. The complaint contains three counts, one on an account stated, one on an account for money had and received, and one for goods and chattels sold.

The case made by the record is stated in the opinion of the court.

JAMES H. SAVAGE, for appellant.

WALDEN & SON, and WATTS & SONS, *contra*.—There is no bill of exceptions in this case, and this court can not look beyond that which is shown to be the record. There seems to be one continuous record, without distinguishing between what is legitimately record, and what is otherwise made record. If this



[Weems v. Weems.]

paper purported to be a bill of exceptions, it might possibly be so treated; and then this court could not look to the decisions of the lower court on the pleadings incorporated in the bill of exceptions.

STONE, J.—It is to be regretted that the present record comes before us in so confused a shape, that we are unable to review the rulings in the court below. If properly presented, we would not hesitate to announce that in several important particulars, the Circuit Court erred. What, in the argument of counsel, is claimed as a bill of exceptions, we can not so regard. Sections 3107–8 of the Code of 1876 give directions for the preparation and execution of a bill of exceptions. “Either of the parties in any civil case, during the trial of the cause, may reserve, by bill of exceptions, any charge, opinion, or decision of the court, touching the cause of action, and which would not otherwise appear of record. The bill must be tendered by the party supposing himself aggrieved, stating the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible.” The substance of what a bill of exceptions shall contain, has come to be pretty well understood. Its object is to make the record speak, what would not otherwise appear, touching any “charge, opinion or decision” of the court, in which the court is supposed to have erred, to the prejudice of the party complaining. It need not and should not contain the process, the pleadings, or judgment of the court. All these are parts of every record, and do otherwise appear. It should also be so framed, as to show its purpose, and must be signed by the presiding judge, in such manner as to show it was intended as a bill of exceptions. We are no sticklers for form, but the purpose to reserve the point or points must appear in substance.

The present record is made up entirely of a bill of exceptions, or it contains no bill of exceptions. The process, complaint, demurrer, amended complaint, pleas, evidence, charges of the court, judgment-entry, are each and all stated in consecutive order, and if there be a bill of exceptions, all these constitute a part, or parts of it, and neither of them otherwise appear in the record. The caption of the record is as follows:

|                              |   |  |
|------------------------------|---|--|
| “Asa Weems, plaintiff,       | { | In Circuit Court, Cherokee<br>county, Spring term, 1880. Hon.<br>W. L. Whitlock, judge, presiding. |
| v.<br>Joel Weems, defendant. |   |  |

On the trial of this cause the following proceedings were had.” Then comes a motion to have counsel assigned to defend for the defendant, who was a *non compos*; and the court assigned counsel for the purpose. Then follow the entire proceedings in the cause, as stated above, beginning with the summons and

[Cen. R. R. and Banking Co. v. Letcher.]

complaint, and ending with the verdict and judgment. To that is added the following words, and only the following words: "And the def't's att'ys now assign each and all of the said rulings of the court as errors. (Signed) Wm. L. Whitlock."

We can not regard this as a bill of exceptions, for it fails to express directly, or by implication, that it was so intended.

The judgment-entry contains the ruling of the court on the demurrer to the complaint. The demurrer, however, was to the entire complaint, and some of the counts are certainly sufficient. The Circuit Court did not err in overruling the demurrer.—*Pryor v. Beck*, 21 Ala. 393; *Hayes v. Anderson*, 57 Ala. 374.

Affirmed.

## **The Central Railroad and Banking Company of Georgia v. Letcher.**

*Action against Railroad Company for Personal Injuries caused by the Running of its Trains.*

1. *Negligence; failure to give signals required by statute; contributory negligence.*—While the negligence of the employees of a railroad company in failing to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving a depot, is of itself and in itself negligence, involving the company in liability for all injuries to person or property resulting from the failure; still the statute does not relieve one in peril of injury from such failure and consequent negligence, from the duty and necessity of taking ordinary care to avoid the injury, nor does it modify or abrogate the principle, that a plaintiff shall not recover for injuries, not wanton in their character, to which his own negligence directly and immediately contributes.

2. *Contributory negligence; what will defeat recovery.*—Plaintiff having boarded defendant's passenger train, for a lawful purpose, on its arrival at one of the regular stations on the line of its railroad, was detained by his business until after the train had started on its journey; and while the train was moving from the depot, its speed increasing each moment, he, of his own accord, to prevent being carried off, and without notifying any of defendant's employees of his presence, and without requesting any of them to slow or stop the train, and without any effort to arrest its progress, walked from the platform of one car to that of another, and with papers in his right hand, descended the steps of the car and jumped from the moving train at right angles thereto and fell, and in the fall his left arm was caught under the wheel of the car and crushed: *Held*, that the injury sustained by the plaintiff was attributable directly and immediately to his own thoughtless and reckless act, and he can not therefore recover, though the defendant was negligent in not giving the signals required by the statute, before and at the time the train left the station.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

VOL. LXIX.

[Cen. R. R. and Banking Co. v. Letcher.]

This was an action by James F. Letcher, the appellee, against The Central Railroad and Banking Company of Georgia and The Georgia Railroad and Banking Company, corporations owning and operating a railroad in this State, the appellants, for the purpose of recovering damages for personal injuries sustained by the appellee in jumping from the train of the appellants while it was in motion. The companies pleaded not guilty, and upon the issue thus made the cause was tried. The plaintiff in the lower court was examined as a witness in his own behalf, and his testimony was, in substance, as follows: On the evening of March 7th, 1879, he went on board of one of the passenger trains of the defendants, at its regular depot in the town of Auburn, for the purpose of handing a note to a young lady, who was expected to pass through on the train on her way to Montgomery, at the same time, at the request of an acquaintance, escorting on the train another lady who intended becoming a passenger thereon. There was no conductor in the ladies' car when he entered, and he had some trouble, and experienced some delay in finding a seat for the lady whom he had escorted on board of the train, but finally succeeded in obtaining one near the door. By the time the lady had taken her seat the train started, and plaintiff, turning to the lady for whom he had the note, and who was seated immediately across the aisle from the one for whom he had obtained the seat, told her that he had a note for her, but that he did not have the time to give it to her, he at the same time continuing to move towards the door of the car, and taking out some letters from the breast pocket of his coat. Without stopping he went out the door, and finding a man on the platform of the car out of which he had come, and in the way of his getting off therefrom, he stepped forward on the rear platform of the next car, and thence down the steps and directly off the car at right angles thereto, still having in his right hand the letters which he had taken from his coat pocket, while he was in the car. He did not remember whether he took hold of the railing with his left hand or not. At the time he stepped off the car, the train was running at the rate of five or six miles an hour. As his foot touched the ground he was tripped by the two motions, and fell to the ground, and as he fell his left arm was caught under the wheel or some portion of the car, and was so crushed and mutilated that it had to be amputated. He did not hear the bell ring, or the whistle blow, immediately before or at the time the train started.

Several other witnesses were examined, and the evidence was conflicting as to the length of time the train stopped at the depot, some testifying that it did not stop a minute, others that it stopped two or three minutes, and as to whether the bell rang



[Cen. R. R. and Banking Co. v. Letcher.]

or the whistle blew immediately before and at the time of starting, and also on other points. But the view of the case taken by the court renders it unnecessary to further set out the testimony. In addition to numerous other charges, the defendants asked the court in writing to charge the jury, that if they believed the evidence they must find for the defendants. The court refused to give the charge, and the defendants excepted. The jury returned a verdict for the plaintiff, and a judgment was rendered thereon in his favor. The ruling of the Circuit Court above noted is one of the errors here assigned.

GEO. P. HARRISON, for appellants.

J. M. CHILTON, W. H. BARNES and W. J. SAMFORD, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—In *M. & C. R. R. v. Copeland*, 61 Ala. 376, the undisputed facts were, that plaintiff's intestate attempted to cross defendant's railroad track, by passing under the coupling of two box cars, which were coupled together and constituted part of a freight train, then standing temporarily on the side track, placed there with locomotive and steam up, to allow a passenger train to pass it. While in the act of passing under the coupling, the train was moved, and he was knocked down, run over and killed. There was conflict in the proof as to whether the required signals were, or were not given; but upon the assumption that the signals required by statute were not given, and upon a consideration alone of the undisputed facts, we held, that the attempt thus to pass between the cars of a train, which he must have known was liable to be moved, could not be classed as less than negligence, bordering on recklessness. "It certainly contributed," we said, "proximately contributed to the very sad disaster which followed. If the usual signals had been sounded, probably the intestate could have extricated himself in time to save his life. If he had not attempted to cross over between the cars, he would have been in no peril and suffered no injury. Both were in fault." Our decision in that case was, that there could be no recovery against the railroad company, although there was on its part negligence in failing to give the signals required by statute, immediately before, and at the time of the moving or departure of the train, the injury not having been inflicted wantonly or intentionally.

Applying the same principles to the facts of this case, as shown by the evidence of the plaintiff, and deducing therefrom every inference advantageous to him, which may be fairly and

[Cen. R. R. and Banking Co. v. Letcher.]

properly deduced; excluding all evidence favorable to the defendants, the injury of which he complains is attributable directly and immediately, not to the negligence imputed to the defendants, but to his own thoughtless and reckless act. The risk he assumed, and assumed only to avoid a slight temporary inconvenience, in view of the circumstances, was more hazardous than that Copeland assumed. When he endeavored to pass under the train, it was motionless, and there was no indication that it would be moved before he would have passed beyond it. The train here was moving from a regular depot, on its accustomed journey, the speed increasing every moment; all who were in charge of it were ignorant that the plaintiff was upon it; and without notice, or request to any of them to slow or stop the train, without an effort to arrest its progress, of his own accord, his right hand filled with papers taken from his pocket, he walks from one platform to another, and descends in a manner that was almost certain to cause him to fall. To permit him to recover of the defendants for the injuries sustained by the fall, would be simply compelling them to compensate him for his own wrongful and reckless act. Under these circumstances, the court should have instructed the jury, on the request of the defendants, that the plaintiff had no right of recovery. There was really no question to submit to the determination of the jury, without seeming to invite them, under the influence of sympathy for the sufferings of the plaintiff, or upon conjecture and speculation, to render a verdict it would have been the duty of the court to set aside.—*M. & C. R. R. Co., supra; R. R. Co. v. Houston*, 95 U. S. 697.

As was said by Black, C. J., in *R. R. Co. v. Aspell*, 23 Penn. St. 147: "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." The negligence of the employees of the defendants—the failure to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving the depot, involved the defendants in liability for all injuries to person or property, resulting from the failure. Of itself, and in itself, it was negligence.—*M. & C. R. R. Co. v. Copeland, supra*; 2 Thomp. Neg. 232, § 8. The statute does not relieve whoever may be in peril of injury from the neglect of the servants and employees of the railroad company to observe its requirements, from the duty and necessity of taking ordinary care to avoid the injury; nor does it modify or abrogate the principle, that a plaintiff shall not recover for unintentional

[Cen. R. R. and Banking Co. v. Letcher.]

injuries—for injuries not wanton—to which his own negligence directly and immediately contributes.—*R. R. Co. v. Houston*, *supra*.

The only injury which could have resulted to the plaintiff, from the neglect to give the signals for the departure of the train, was the inconvenience of being carried from his home; the loss of time, and the labor or expense of returning. These were the immediate, direct consequences of the neglect. To avoid them he was not justified in putting in jeopardy life or limb; and if he should, and other injury result, the compensation he can rightfully demand is not increased. What would have been his rights, if there had been the presence or pressure of impending peril of personal injury, and to avoid it, he had leaped from the train; or, what would have been his rights, if under the advice, direction, or command of an agent or employee of the defendants, he had left the train as he did, are not questions now for consideration. In the absence of such peril, or of such advice, direction, or command, or of some other circumstance, lessening the carelessness of the act, or giving to it the color of necessity, leaping from a moving train by all the authorities is esteemed negligence, debarring a recovery because of the prior negligence of the servants or agents of a railroad company. The question is fully considered and discussed in authorities to which we refer.—*Lucas v. N. B. & T. R. R. Co.*, 6 Gray, 64; *Morrison v. E. R. Co.*, 56 N. Y. 302; *Burrows v. E. R. Co.*, 63 N. Y. 556; *R. R. Co. v. Aspell*, 23 Penn. St. 147; *Damont v. N. O. & C. R. R. Co.*, 9 La. An. 441; *J. R. R. Co. v. Hendricks*, 26 Ind. 228; *Dougherty v. C. B. & Q. R. R. Co.*, 86 Ill. 467; *Lambeth v. N. C. R. R. Co.*, 66 N. C. 494; *Doss v. M. K. & T. R. Co.*, 59 Mo. 27; *Nelson v. A. & P. R. R. Co.*, 68 Mo. 593; *L. S. & M. S. R. R. Co. v. Bangs*, 47 Mich. 470.

The Circuit Court erred in several of its rulings, and especially in refusing, on request, to charge the jury on the evidence to find a verdict for the defendants.

Reversed and remanded.



[Snow v. Schomacker Manufacturing Co.]

## **Snow v. The Schomacker Manufacturing Company.**

### *Assumpsit for Goods Sold and Delivered.*

1. *Construction of contract determined by place of performance.*—The construction of a contract of sale of personal property, made and performed in another State, must be determined, as to its obligations and the rights of the parties thereunder, by the law of such State.

2. *Common law presumed to prevail in Pennsylvania.*—Pennsylvania having a common origin with this State, in the absence of proof to the contrary, the common law is presumed to prevail therein.

3. *Sale by manufacturer of manufactured articles; implied warranty.* Where a manufacturer sells an article of his own make or manufacture, the law, in the absence of an express warranty, implies one on the part of the seller, that such article is reasonably fit for the purpose to which it is to be applied.

4. *Same.*—Where a manufacturer sells a piano, with knowledge that the purchaser is a dealer in pianos and is purchasing to re-sell or let to rent, there is, in the absence of an express agreement to the contrary, an implied warranty, that the material and workmanship are good, that the instrument is adapted to the uses for which it was made and sold, and that it is a reasonably good musical instrument, taking into the estimate its class or style and price; and if by reason of defective materials, workmanship or structure, it falls below this standard, there is a breach of the warranty.

5. *Contract of sale; when advertisement a part of.*—Where a manufacturer offers by letter to sell pianos of his own manufacture to a party at a distance, stating the terms of the sale, and directing attention to a circular advertising the pianos, sent by the same mail, on the front page of which is printed in a conspicuous manner the words, "Every piano warranted for five years;" these words are thereby incorporated into the offer contained in the letter, and, on acceptance of the offer and a purchase thereunder, after the receipt of the circular, they constitute a part of the contract of purchase.

6. *Sale of chattels; express warranty construed.*—The words, "Every piano warranted for five years," contained in a contract of sale of pianos by the manufacturer, constitute a warranty, that each piano sold has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale; but they do not warrant the style or grade of the instrument.

7. *Breach of warranty in sale of personal property; when not waived; when damages thereunder available under plea of set-off; measure of damages.*—At different times during the years 1875 and 1876, a party residing in this State purchased from a manufacturer in Philadelphia several pianos for the purpose of re-selling or letting them to rent, with warranty that each piano had no inherent defect, either of materials or workmanship, which would cause it to break or give way within five years. In the latter part of 1876, the iron plate of one of the pianos cracked, thereby injuring its value and saleableness; and thereupon the purchaser called on the manufacturer to repair the instrument, or to substitute a new and sound one in its place. This, in the spring of 1877,

## [Snow v. Schomacker Manufacturing Co.]

after some correspondence, the manufacturer refused to do. In the latter part of 1877, the purchaser in person purchased of the manufacturer two additional pianos on credit, and agreed to give his acceptances therefor. At the time of this purchase nothing was said by the purchaser of his claim for damages on account of the cracked or broken plate. Afterwards, the purchaser refused to give his acceptances because the manufacturer had failed to repair or make good the crack or break in the plate of the piano about which the correspondence was had, and also because the plate of another of the pianos first purchased had broken or cracked. In a suit brought by the manufacturer for the price of the two pianos last purchased, the purchaser sought to set off against the plaintiff's demand the damages sustained by him in the breaking of the plates of said pianos,—*held*,

(a). That if such breaks occurred from inherent defects in the material or workmanship of the pianos, this was a breach of the warranty in the sale of the instruments, and legal damages resulting therefrom could be made available under the plea of set-off against the plaintiff's demand for the price of the two pianos last purchased.

(b). That the measure of damages in such case is the actual proximate injury sustained, including such expense as was reasonably necessary to repair the instruments and to put them in the condition they would have been in, if there had been no break; the expense of new iron plates, and of putting them in and adjusting the other parts to them, and the expense of transportation to and from the factory, if shipment thereto be necessary to obtain such repairs. But it does not include such items of accidental or extraordinary expense as cartage to and from sub-purchasers, and the temporary use of other pianos in their place.

(c). That the failure on the part of the purchaser to renew his demand for indemnity against the damages which he had sustained from the breaking of the first piano when he made the last purchase, can not, as matter of law, amount to a waiver of the warranty or of the damages resulting from a breach thereof.

(d). That his conduct was, at most, a circumstance to be weighed by the jury in connection with the other evidence, in determining whether he had abandoned his claim for damages, by failing to mention it.

8. *Errors committed on trial; when not healed.*—The mere fact that an issue is found in the record, which, under the evidence, might have been the basis of a general charge in favor of the appellant, if it had been requested, does not heal errors which the court committed in charging the jury on other issues.

**APPEAL from Mobile Circuit Court.**

Tried before Hon. H. T. TOULMIN.

This suit was brought by the Schomacker Manufacturing Company, a corporation existing under the laws of the State of Pennsylvania, and having its principal place of business in the city of Philadelphia, against Joel H. Snow, for the purpose of recovering the price of two pianos manufactured by the plaintiff and by it sold to the defendant. The pleadings and facts are sufficiently stated in the opinion. On the trial, the Circuit Court, at the request of the plaintiff, gave to the jury the following charges in writing, to-wit: 1. "In order to establish a warranty by custom or usage the custom or usage must be general and uniform, both as to the fact of warranty and the terms and meaning as understood by both seller and buyer, and also as to the manner of making such warranty; and if such custom

[Snow v. Schomacker Manufacturing Co.]

be not general and uniform in these respects, no warranty can be thereby established to bind the plaintiff; and it makes no difference that some other manufacturers have a usage of their own in respect to sale of pianos by them." 2. "To establish a warranty by custom or usage, the said custom must be uniform as well as general, and the contract, to constitute a warranty, must be intentionally entered into by both parties, that such custom is to constitute a warranty." 3. "If the jury believe from the evidence that a controversy arose between the plaintiff and the defendant as to what each should do in the case of a cracked plate, and the plaintiff denied the claim made by the defendant, and the defendant thereafter purchased two other pianos without having any further discussion or understanding as to any agreement concerning such accidents, then as to the last purchase of said pianos, the defendant as to like claims was bound by the previous construction put upon it by the plaintiff." 4. "If the jury believe from the evidence that defendant Snow bought the pianos which were sold in November, 1877, the purchase-money of which is sued for in this case, with a knowledge that plaintiff had repudiated the defendant's construction of his liability under the preceding contract of purchase, then the defendant can not hold him under such construction, so far as those pianos are concerned, irrespective of the customs of trade attempted to be shown in evidence by the defendant." To the giving of these charges the defendant separately excepted. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon against the defendant; and from this judgment he appeals.

OVERALL & BESTOR, for appellant.

GAYLORD B. & FRANK B. CLARK, *contra*.

STONE, J.—In February, 1875, the plaintiff below, appellee here, instituted and commenced the correspondence, which led to the sales of pianos by the Schomacker Manufacturing Company to Snow. Those sales and their stipulations furnish the entire subject of this controversy. All the testimony shows that the sale and delivery of the pianos, about which there is contention, were made and perfected in the State of Pennsylvania. It follows that, as to the obligations of the contract, express and implied, the construction must be determined by the law of the place where the contract was made.—Whar. Conf. of Laws, § 401, *g*; Sto. Conf. of Laws, § 76; 1 Brick. Dig. 352, §§ 20, 22, 24, 27.

What are the laws of Pennsylvania, governing the questions presented in this record, was not proved in the court below.



[Snow v. Schomacker Manufacturing Co.]

We are not permitted to look beyond the record, for information on this subject.—*Drake v. Glover*, 30 Ala. 382. But Pennsylvania being one of the States having a common origin with our own, in the absence of proof to the contrary, we presume the common law prevails there.—1 Brick. Dig. 349, § 9.

The present suit was brought to recover the agreed price of two pianos, sold and delivered in Pennsylvania in 1877. The plaintiff proved the sale and delivery, and the agreed price, and then closed. The articles sold were manufactured by the plaintiff, and were sold to the defendant, with a knowledge on the part of the plaintiff, that defendant was a dealer in pianos, and was purchasing to resell, or let to rent. As their name imports, they were manufactured and sold as musical instruments. When a manufacturer contracts to sell an article of his own make or manufacture, and there is no express agreement as to warranty, the law implies a warranty on the part of the seller that it shall be reasonably fit for the purpose to which it is to be applied.—Benj. on Sales, 3d Amer. Ed., § 657; 2 Ross Lead. Cases, m. p. 358; *Jones v. Bright*, 3 M. & P. 155; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. This implies that the material and workmanship shall be good, and that the instrument shall be reasonably adapted to the uses for which it is made and sold; that it shall be a reasonably good musical instrument, taking into the estimate the class or style, and the price for which it is sold. If, by reason of defective material, workmanship or structure, it falls below this standard, there is a breach of this implied warranty.

The defendant pleaded recoupment and set-off, and claims that in addition to the implied warranty referred to above, there was an express warranty of the pianos he purchased, to continue and be in force for five years. The testimony tends to show the following state of facts: Under date February 16th, 1875, the president of plaintiff wrote to defendant and another, his former partner, stating that "at present our instruments are not represented in your section," and inviting him to become a purchaser of plaintiff's pianos. The letter offered generous terms, spoke highly of the merits of the instruments, and in a postscript said: "We have mailed you our catalogue and price list, which we would like you to examine, and would particularly call your attention to style No. 6, which is a very leading instrument, and which we purpose to reduce to you on our schedule to \$600, which will give you a 7½ oct. piano for \$270 on the 30 days basis. We intend making a specialty of this style, and will run it extensively." The defendant answered this letter in his own name, under date, March 13th, 1875, and, among other things, informed plaintiff that he and his former partner had dissolved, by the withdrawal of the latter. He made an

[Snow v. Schomacker Manufacturing Co.]

offer in said letter, different from that made by plaintiff. Plaintiff replied March, 18th, declining defendant's offer, and urging defendant to accept his, plaintiff's. This was done; and on April 3d, 1875, plaintiff wrote defendant as follows: "Enclosed I hand you bill and bill lading of four pianos sent to you as per your order," etc. The bill of lading describes the pianos by their several numbers of octaves, by their style numbers, manufacturer's numbers, and by their several prices. In the bill of exceptions is an original advertisement or circular, containing many certificates of recommendation, and a price list, setting forth nineteen different styles of piano, with brief description, and price of each style, all in type, and prefaced with a cut or engraving of the manufacturer's building. The style numbers and prices on this price list correspond with the style numbers and prices on the bill sent to defendant. The defendant testified that this advertisement or circular and price list reached him by the same mail which brought him plaintiff's first letter, referred to above. The president of the company testified "that the catalogue and circular, introduced by Snow in evidence, were not mailed to Snow and Snow & Brown at the same time he wrote the first letter, and that defendant could not have received them until a long time afterwards, some eighteen months perhaps." So, there was conflict in the testimony as to whether Snow received this circular and price list, until after he had purchased several pianos, including those first ordered as above. On the first page of this circular, below the cut or engraving, are the following words in printed capitals: "EVERY PIANO WARRANTED FOR FIVE YEARS."

In the court below much testimony was offered, and some received, tending to show the usage and general custom with piano manufacturers, in regard to warranties in the sale of their merchandise. Much of this testimony, we think, related only to the habit of other manufacturers in their own dealings, rather than to a general usage or custom of trade. Most or all of this testimony, as we shall hereafter show, was either illegal, redundant, or immaterial. Strictly, there was no legitimate testimony offered, which tended to show that, in the absence of all express stipulations to that effect, there was a general custom or usage with piano manufacturers that they warranted all pianos sold by them of their own make. Their testimony is, that in their dealings, they give express written warranties, stating the number of the piano, the date of the sale, and the term of the warranty. Most of the testimony sought to be introduced to establish a general custom, was nothing more than what the witness thought the manufacturer should have done under the circumstances. Some of the witnesses undertook to testify to the meaning and import of the words relied on as constituting the

[Snow v. Schomacker Manufacturing Co.]

warranty in this case. The president of the plaintiff corporation, in his testimony before the jury, stated "that the word 'warranted' in the circulars and in the catalogues, merely meant warranted to be a piano." According to this, the language should be read, "*Every piano warranted [to be a piano] for five years.*" This, to say the least of it, is a strange use of language. But we need not pursue this inquiry further.

What is the proper construction of the words, "Every piano warranted for five years?" We think no outside testimony is needed to show their import. Language must be interpreted with reference to the subject about which it is employed. Here the subject was a well known musical instrument, now universally called a *piano-forte*—having reference to the softness and fullness of its tones. The excellence of such an instrument must depend on many things, and among them, chiefly, the goodness of the materials, and the skill and fidelity of the workmanship. If the instrument be so constructed and adjusted as to respond readily to the touch, to give forth pleasing and properly graduated sounds through the range of its keys, and the frame-work be so adapted and put together as to retain the strings in tension, and the mechanism does not yield or break in any part of it, these are certainly points of excellence. But these qualities depend much on the grade and costliness of the instrument. We can not think the word "warranted," without more, is definite enough to cover and guaranty the style or grade of the instrument. That must be determined by the purchaser. We think the true meaning is, that with reasonable and proper treatment and handling, it will not break or give way in five years. In other words, that it has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale. And by mechanical skill, we mean not merely that the parts shall be well fitted, and securely put and fastened together. They must be properly adapted, adjusted and harmonized, to secure the proper effect. But, the present warranty reaches only breaks, or giving way, occurring within the five years.

It is contended, however, for appellee, that if we construe the words we are considering as a warranty, it is invalid under our statute of frauds, because it is not in writing, expressing the consideration, and signed by the party sought to be charged. It is a sufficient answer to this, that this contract was made in Pennsylvania, where we presume the common law prevails. If there is any statute of that State requiring that contracts not to be performed within a year shall be in writing, signed, etc., it is neither pleaded nor proved in this case. We will recur to this subject further on.

In stating the testimony above, we showed that Snow, the  
VOL. LXIX.



[Snow v. Schomacker Manufacturing Co.]

appellant, and the president of the plaintiff corporation, flatly contradict each other as to the time when the circular and price list were sent to the former. If appellant's version be believed, then the letter of the president of the corporation, accompanied with the circular containing the printed words of warranty, was an offer by the corporation to sell pianos to Snow, with a warranty, such as we have defined above. And when Snow accepted the offer, and purchased the pianos, he received with them the corporation's warranty to that extent. If the other version be the true one, and Snow made the purchase before seeing the circular, then Snow purchased without any warranty, save that implied in a sale by a manufacturer of goods manufactured by him. The principle governing in such cases is stated above. This disputed question of fact is one for decision by the jury.

During the years 1875 and 1876, Snow purchased from the plaintiff corporation seven pianos. Late in the year 1876, the iron plate of one the four pianos first purchased cracked, thereby injuring the value and saleableness of the instrument. Snow had previously sold the piano with warranty, and had taken it back and put a new one in the place of it. He then called on the plaintiff to repair the instrument, or substitute a new and sound one in its place. The plaintiff corporation offered, if Snow or his vendee would pay freight charges and expenses of transportation to and from its factory in Pennsylvania, it would either put a new plate in that piano and return it, or ship him a new and sound one in place of it. This offer Snow and his vendee declined to accede to, and no other correspondence then took place in regard to it. The close of this correspondence was in the spring of 1877, and there were then no unsettled matters between the parties, save the unacknowledged and unadjusted claim of Snow for the one broken piano. Later in that year—about November, 1877—defendant in person purchased of the plaintiff at its salesroom in Philadelphia two additional pianos on six months' time, on an agreement to give his acceptance therefor. At the time of this purchase Snow said nothing of his claim for damages on account of the cracked or broken frame. When called on by letter for his acceptance, after the goods had been received by Snow, he refused to give it, urging as a reason the failure of the plaintiff to repair or make good the crack or break in the piano, mentioned above, and also claiming damages for a similar break or crack in another of the four pianos first purchased. Thereupon this suit was brought for the price of the two pianos last purchased. Before the trial was had, the defendant claimed, and offered testimony tending to prove, that one of the two pianos last purchased cracked or broke in the same manner as the above, and he claimed damages for that break. So, according to Snow's claim and testi-

[Snow v. Schomacker Manufacturing Co.]

mony, the iron plates of three of the nine pianos he had purchased of plaintiff, had cracked in the same manner, and at the same place; the last break occurring in defendant's store, within a short time after he had received it. The defense was recoupment and set-off: recoupment, for the alleged imperfection and break in one of the instruments, for the price of which suit was brought; and set-off of the damage caused by the break of two of the instruments previously purchased. There can be no question that if the breaks occurred from inherent defects in the material or workmanship of the pianos, this was a breach alike of the implied and express warranty in the sale of these instruments, and the damage resulting therefrom could be made available under the plea of set-off, to the extent and subject to the rules after stated.—2 Brick. Dig. 425 §§ 41 to 47 inclusive.

It is contended for appellee, that inasmuch as Snow's claim of damages for the break of the plate which first occurred, was never admitted, but was denied and refused by plaintiff, and the correspondence in regard to such claim, instituted by Snow, had been allowed to stop, without having the claim adjusted or admitted; "and the defendant purchased two other pianos, without having any further discussion or understanding as to any agreement concerning such accidents, then as to the last purchase of said pianos the defendant as to like claims was bound by the previous construction put upon it by plaintiff." The Circuit Court so charged the jury at the request of the plaintiff, to which there was an exception by defendant. We need not inquire whether or not this charge would be correct, if, as it seems to suppose, there was no proof of express warranty, and the law implied none; in other words, if the case stood alone on proof of a general custom, or usage of trade in such cases. That is not this case. We have shown above that there was an implied warranty that the materials and workmanship were good, and that the instruments were reasonably well adapted to the uses and purposes for which they were manufactured and sold. And the express warranty, if found to have entered into the contract under the rules above, extended, or limited the liability, for the term of five years after the sale. There being both an implied and an express warranty, a failure on the part of Mr. Snow to renew the demand for indemnity, on the occasion when he made the last purchase, can not, as matter of law, amount to a waiver of that term of the contract. It may be that at that time, when only one plate had cracked, as the testimony tends to show, he was willing to waive that; but his conduct does not conclusively prove this. It is, at most, a circumstance, to be weighed by the jury in connection with the other evidence, in determining whether either party, by failing

[Snow v. Schomacker Manufacturing Co.]

to mention it, had abandoned the ground taken in their former correspondence, which correspondence had led to no result.

The pianos were sold with knowledge, and with intent, that they should be carried to Mobile, Alabama, and there re-sold, or let to rent. The question is made, what is the measure of damages, if there was a breach of the warranty, express or implied. The actual, proximate injury sustained from the breach, is the general rule of damages.—*Bolling v. Tate*, 65 Ala. 417. This will include such expense as was reasonably necessary to repair the instruments, or to put them in the condition they would have been in, if there had been no break. The expense of transportation to and from Pennsylvania, if such shipment was necessary to obtain the repairs, and the expense of a new iron plate, putting it in, and adjusting the other parts to it, are each and all natural and proximate results from the breach, and are the proper measure of recovery, if, according to the principles declared above, there has been a breach of the warranty. In other words, the expense of having the machine restored to its normal condition. Whether the plate could have been replaced away from the factory, was a question on which all the witnesses did not agree. It would be the duty of the purchaser, in such a case as this, to have the repairs made at as light expense as he reasonably could. The refusal of the manufacturer to pay the expense of transportation would possibly enhance the expense of having the repairs made. Whatever the expense would reasonably amount to, that is the proper criterion of damages. Our want of knowledge forbids us to assume that the instruments could, or could not have been repaired, outside of a factory, constructed for their manufacture, or to hazard an opinion as to the difference, if any, in the cost of repairs, when made by the manufacturer of the instrument, or by another manufacturer. This is a question for testimony. The real damage is the difference in value of the instrument, as it was, and where it was, and what it would have been, if sound. See *Converse v. Burrows*, 2. Min. 229. But this, at last, is but another mode of stating the expense of having the proper repairs made, including transportation, if necessary.

Some items of accidental, or extraordinary expense—such as cartage to and from the sub-purchaser, and the temporary use of another piano—were properly disallowed. They are too remote.—*Bolling v. Tate*, 65 Ala. 417; *Hargous v. Ablon*, 5 Hill (N. Y.), 472.

The charge given, which we have above pronounced incorrect, is numbered 3, of those asked by the plaintiff. Charge No. 4 of its asking is faulty for the same reason. Charges 1 and 2 given, and the charge asked by defendant, and refused—all relating to general custom, or usage of trade—do not put



[Snow v. Schomacker Manufacturing Co.]

the court in error; but they have nothing to do with this case.

It is claimed for appellee that all the foregoing questions are rendered unimportant, in consequence of the issue formed on the 2nd replication to defendant's pleas, which is in the following language: "That the said alleged agreement or contract of warranty was not in writing subscribed by the plaintiff, or any agent of plaintiff thereunto lawfully authorized in writing, and not by its terms to be performed within one year from the making thereof." There being no demurrer to this replication, if the evidence sustained its averments, a charge that if the jury found the averments to be true, they must disallow the set-off, if asked, should have been given; and if given, would have furnished no ground of reversal.—*Farrow v. Andrews & Co.*, ante p. 96; *Mudge v. Treat*, 57 Ala. 1. But this case did not go off on that question. In fact, the record fails to show that there was any ruling as to the sufficiency of that replication, or that the issue raised upon it entered into the trial before the jury. The fact that that issue is in the record, and might have been the basis of a charge on which the plaintiff could probably have recovered, does not heal errors the court did commit, in charging on another issue. We have shown above that in two of the charges given, the Circuit Court erred.

But there is another, if not a stronger reason, why we should not apply the rule invoked. The replication we are considering is based on the Alabama statute of frauds. The contract was made in Pennsylvania, and must be construed, and the rights under it determined, by the laws of that State. If they have a statute of frauds like ours, the record does not inform us of it. Browne's Stat. Frauds, appendix, 623. If there had been a finding on the issue tendered by the replication we are considering, it would have been a finding on an immaterial issue, and we can not know that the court would not, on motion, have awarded a replader.

The Circuit Court having erred in the two charges given, it follows that its judgment must be reversed.

Exceptions were reserved to the exclusion of testimony; notably, the testimony offered of difference in value in Mobile, between the instrument sound, and the instrument broken. We think such testimony a legitimate source of information, as to the injury which resulted from the plaintiff's breach of warranty, if the jury find there was a breach. It was greater than if the breach had occurred, or should occur near the factory, by so much as the transportation would cost to and from a place where the repairs could be made. What we have said will furnish a sufficient guide for another trial.

Reversed and remanded.

[Beck v. Glenn.]

## Beck v. Glenn.

### *Action of Unlawful Detainer.*

1. *Unlawful detainer; when verdict and judgment sufficient.*—In an action of unlawful detainer, a verdict in these words: "We, the jury, find for the plaintiff for the premises sued for, and assess the rents at one hundred and fifty-one dollars," is sufficient; and a judgment rendered thereon is authorized by the statute, which is for the recovery by the plaintiff of the property described in the complaint, ordering the issuance of a writ of restitution therefor, and which adjudges the costs against the defendant and the sureties on his appeal bond, to the amount of the penalty of the bond, and as to the balance, against the defendant alone; and which also adjudges that the plaintiff recover of the defendant and the sureties on the bond executed to prevent the issue of a writ of restitution, the amount assessed by the jury as rents, the penalty of such bond being in excess thereof.

2. *Same; that plaintiff regained possession after suit brought, no defense.* The action of unlawful detainer, like the action of ejectment as it exists under the statute, being a *mixed* action in which the plaintiff can recover rent, by way of damages, as well as the possession of the property, it is no defense to the action that the plaintiff regained possession of the premises sued for pending an appeal by the defendant to the circuit court.

3. *Same; statute conferring jurisdiction constitutional.*—The statute conferring on justices of the peace jurisdiction in proceedings of unlawful detainer, is not violative of the constitution. *Webb v. Carlisle*, 65 Ala. 313, explained.

4. *Pleas in abatement not favored by the law.*—Pleas in abatement, being dilatory in their nature, are not favored by the law, and are required to be filed as soon as practicable, so as to prevent the unnecessary accumulation of costs occasioned by protracted delays, and to guard against the hazard of a bar by the statute of limitations, in the event of the abatement of the action on some technical ground not going to the merits.

5. *Same; when should be filed in justice's court.*—While the rule of practice relating to pleas in abatement in the circuit court can not be literally or technically applied in a justice's court, yet, the reason of the rule applying in such court with equal force, the rule certainly can be there applied, to a certain extent, by analogy.

6. *Same; when circuit court committed no error in refusing to allow filed.*—A justice of the peace having declined to permit the defendant in an action of unlawful detainer pending before him, to file a plea of misnomer after the cause had been continued twice on account of the delay, there was no error in the refusal of the circuit court, on appeal by the defendant, to permit him to file the plea in that court.

7. *Unlawful detainer by landlord against tenant; rule as to possession.* While the general rule is, that, in order to maintain an action of unlawful detainer, the plaintiff must have had prior actual possession of the premises sued for, mere constructive possession not being sufficient; yet, where the action is brought by a landlord against a tenant for unlawfully holding over after expiration of his term, the tenant is estopped from disputing the fact of the landlord's prior actual possession, and he there-

[Beck v. Glenn.]

fore can not defend by showing that such prior possession was merely constructive.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action of unlawful detainer, commenced before a justice of the peace by Abram N. Glenn against Wilson Beck. The complaint was filed and notice issued on 7th January, 1880, the notice requiring the defendant to appear on 13th of same month. On that day, the parties appearing, the cause was continued, on plaintiff's motion, until 21st January, and it was then again continued until the day following, when the cause was tried. On that day the defendant produced and offered to file a plea of misnomer, but the justice, on plaintiff's objection, refused to allow the plea to be filed, on the ground that it was not filed "at the first term in the justice's court." The justice rendered judgment for the plaintiff, and the defendant appealed to the Circuit Court, executing an appeal bond and also a bond to prevent the issue of a writ of restitution, both bonds having the same sureties and being in substantial compliance with the statute. In the Circuit Court the defendant again insisted on his plea of misnomer, but the court "refused to entertain or consider said plea," and, on motion of the plaintiff, struck the same from the file; to which ruling the defendant excepted. Thereupon the defendant filed a plea, *puis darrein continuance*, setting up as a defense to the action, that the plaintiff had obtained possession of the lot after the defendant's appeal to the Circuit Court. The plaintiff interposed a demurrer to this plea, which was sustained by the court. On the trial in the Circuit Court the evidence tended to show, that in 1877 the lot sued for was a vacant lot, on which the plaintiff had never lived, and which he had never occupied for business purposes; that in the summer of that year he caused a house to be constructed thereon, and before the completion thereof, he rented the lot to the defendant for one year, to commence on first of September, 1877; that he was frequently on the lot and had exclusive control thereof while the house was in process of construction; that the house having been completed, the defendant went into the possession of the lot under his lease from the plaintiff, and continued in the possession thereof under the lease and a renewal thereof, until the first of September, 1879, when his term under the renewal of the lease expired; that after the expiration of his term he continued to hold over, and was in possession of the lot when this suit was commenced; but that after the appeal was taken by him to the Circuit Court, he moved off of the lot, leaving the key of the house in the door; and thereupon the plaintiff took possession



[Beck v. Glenn.]

of, and leased it to another tenant. It was also shown that the plaintiff made a demand in writing of the defendant for the possession of the lot as prescribed by the statute, which the defendant refused to surrender, and that the rent of the house and lot was worth from six to ten dollars per month.

"The court, among other things, charged the jury 'that the plaintiff must show that he was in the actual possession of the lot sued for, before the defendant got possession of the same, but that it was not necessary for the plaintiff to have had his foot on every part of the lot. If he had the control and direction of the lot and put up, or had the house put up on the lot, and the defendant obtained the possession of the lot from the plaintiff as his tenant, and was there as the tenant of the plaintiff, then this would be a sufficient possession on the part of the plaintiff to authorize him to recover, if he was otherwise entitled to recover.' The defendant excepted to the latter portion of this charge commencing with the words: 'but that it was not necessary,' etc., down to the end of said charge." The jury returned a verdict in these words: "We, the jury, find for the plaintiff for the premises sued for, and assess the rents at one hundred and fifty-one dollars." The judgment, after reciting the appearance of the parties and the foregoing verdict, proceeds as follows: "It is, therefore, considered by the court that the plaintiff recover of the defendant the premises sued for and described in the complaint, viz: N.  $\frac{1}{2}$  of lot No. 8, with the appurtenances thereon, in the town of Georgiana, Butler county, Alabama, for which let a writ of restitution issue. It is also considered by the court that the plaintiff recover of the defendant and E. C. Milner and George P. Heard, the sureties on the appeal bond in this case, the costs in this behalf expended in this court and in the court below. And it appearing that the defendant, with E. C. Milner and George P. Heard, entered into bond in the sum of two hundred and fifty dollars, on the 24th January, 1880, conditioned to pay to the plaintiff the value of the use of the premises sued for pending the appeal to this court, in the event the defendant, Wilson Beck, failed in this suit; and now, upon the motion of the plaintiff, by his attorneys, it is considered by the court that the plaintiff recover of the defendant and the said E. C. Milner and George P. Heard the sum of one hundred and fifty-one dollars, the value of the rents as assessed by the jury as aforesaid, for which let executions issue. It is further considered by the court, that the plaintiff do not recover of the sureties on the appeal bond more than the penalty of said appeal bond, but that execution may issue against the defendant, Beck, for the balance of the costs, for which the sureties are not liable."

The errors here assigned are the rulings of the Circuit Court

[Beck v. Glenn.]

on the pleadings, the giving of the charge above noted, and the judgment rendered by the court.

J. M. WHITEHEAD, for appellant.—(1). The court erred in striking the plea of misnomer from the file. Sections 3012 and 3013 of the Code have no application to this case. Rule 14 of the Circuit Court Practice does not apply to a justice's court. (2) The verdict and judgment are manifestly contrary to the statute. They are both framed as if this was an action of ejectment.—See Code of 1876, § 3702. (3). The plea of *puis darrein continuance* was good, and the demurrer should not have been sustained.—51 Ala. 532. (4). The charge of the court was manifestly wrong. It is well settled in this State, that to maintain unlawful detainer, the plaintiff must have been *actually* possessed of the premises, mere constructive possession not being sufficient. The plaintiff, before renting to the defendant, had constructive, but not actual possession.—*Childress v. McGehee*, Minor, 131; *Russell v. Desplous*, 29 Ala. 308; *Singleton v. Finley*, 1 Port. 144. (5). The statute conferring jurisdiction on justices of the peace in actions of unlawful detainer, is unconstitutional.—*Webb v. Carlisle, Jones & Co.* 65 Ala. 313.

GAMBLE & PADGETT, *contra*.—(1.) The court did not err in striking the plea of misnomer from the file. The reason of the rule as to filing pleas in abatement applies to proceedings before a justice of the peace. It is as much a dilatory plea when pleaded in a magistrate's court as when pleaded in the Circuit Court. But this cause being an appeal from a justice's court, it was to be tried in the Circuit Court *de novo*, without regard to defects in the summons, warrant or other process.—Code of 1876, § 3121; 1 Brick. Dig. p. 112, § 55. And the only defense which could have been made on appeal, is one going to the merits of the case.—*McCrory v. Smith*, 1 Ala. 157; *Thompson v. Pierce*, 3 Stew. 427; *Slaton v. Apperson*, 15 Ala. 721; 1 Brick. Dig. p. 113, § 57, and p. 114, § 77. (2.) The judgment and verdict are in conformity to the statute.—Code of 1876, § 3710; *Spear & Thomasson v. Lomax*, 42 Ala. 576. (3.) The plea of *puis darrein continuance* set up no defense to the suit. It can not be that a party guilty of unlawful detainer can force a party entitled to the possession to bring his action for the recovery thereof, and then abandon the possession and "coolly answer the original complaint, by saying that since the commencement of the suit he has voluntarily surrendered possession," and thereby defeat a recovery. (4.) The proof shows that the plaintiff had *actual* prior possession, and then rented to defendant. Besides the defendant's pos-

[Beck v. Glenn.]

session as the plaintiff's tenant, must be regarded as the plaintiff's possession, upon which the plaintiff could recover in this form of action.—*Lecatt v. Stewart*, 2 Stew. 474; 2 Brick. Dig. p. 9, § 38. The defendant was estopped from denying plaintiff's possession.—*Russell v. Erwin*, 38 Ala. 44. (5.) The constitutionality of the statute conferring jurisdiction on justices of the peace in actions of unlawful detainer is so clear, and has been so long acquiesced in, that it is unnecessary to discuss it.

SOMERVILLE, J.—This is an action of unlawful detainer, commenced before a justice of the peace, and removed by appeal to the Circuit Court, where a trial was had *de novo* as required by statute.

It is objected, by the appellant, that neither the verdict nor judgment rendered against him as defendant, in the court below, is in conformity to the statute. This objection, we think, is not well taken.

The premises sued for are described with reasonable, and even accurate certainty, in the complaint, being designated as "The N.  $\frac{1}{2}$  of lot No. 8, in the town of Georgiana, Butler county, Alabama, on which said lot is situated a bar-room, which was occupied by Wilson Beck, the defendant, during the year 1879."—*Townsend v. Van Aspen*, 28 Ala. 572; *House v. Camp*, 32 Ala. 541; *Wright v. Lyle*, 4 Ala. 112; *Cunningham v. Green*, 3 Ala. 127.

The finding of the jury had special reference to this description given in the complaint, and assessed damages against the defendant for double the amount of annual rent for detention of the premises, after expiration of his lease.—Code, 1876, 3709. The judgment properly followed the verdict, the costs of suit being adjudged against the defendant and the sureties on his appeal bond, and the recovery against the sureties being limited to the penalty of the bond. The sureties on the bond, which was given to prevent the issue of the writ of restitution, were liable for the assessment for rent, and it was so adjudged. Code, § 3710. The verdict and judgment were fully authorized by the statute.

It was no defense to the action that the plaintiff regained possession of the premises pending the appeal by the defendant to the Circuit Court. In *Lomax v. Spear*, 51 Ala. 532, it was said by this court, that if the defendant could take advantage of such entry by the plaintiff at all, he could only do so by a plea *puis darrien continuance*. It is true that such a plea was adjudged good in actions of ejectment at common law, but the reason no doubt was, that ejectment was not then, as now under our statute, a *mixed* action in which the plaintiff was permitted to recover rent by way of damages. The only questions in



[Beck v. Glenn.]

issue were those of title and possession, and no recovery could be had unless the plaintiff had title on the day of trial, or unless he was then dispossessed.—Tyler on Eject. 468–470. The action of unlawful detainer is but a summary substitute by statute for ejectment, and a similar rule should obtain in each class of cases. The better view, we think, is, that such a plea is not a defense to these actions, where damages for rent are recoverable, for, as said in *Venner v. Underwood*, 1 Root (Conn.), 73, “the original wrong and disseizen, and the damages still remain to be redressed.” In this case the plea was held insufficient on demurrer, and we think it announced the correct rule of law on the subject. See also *Kennedy v. Holman*, 19 Ala. 734; and opinion of MANNING, J., in *Lomax v. Spear*, 51 Ala. 532, 538.

There is nothing in the suggestion that the jurisdiction conferred on justices of the peace by the legislature, in proceedings of unlawful detainer, is violative of the constitution. In such cases the value of the premises is totally immaterial, and has no relevancy to the proceeding. Such has been the established doctrine in this State for more than fifty years.—*Ward v. Lewis*, 1 Stew. 26. The case of *Webb v. Carlisle*, 65 Ala. 313, merely declares, that where an attempt is made to confer on justices of the peace the authority to try titles to real estate, without regard to the value of the land, it would be objectionable on constitutional grounds. Justices of the peace can not be given jurisdiction of ejectment cases generally by calling them actions of unlawful detainer.

There was no error in the refusal of the Circuit Court to permit the defendants' plea in abatement to be filed. The justice of the peace had declined to receive it on the ground of delay in filing it. While the rule of practice relating to such pleas in the Circuit Court can not be literally or technically applied, perhaps, in a justice's court, it certainly can be by analogy, to a certain extent. The reason of the rule applies with equal force to all the inferior courts. Pleas in abatement are dilatory, and are disfavored by the law on this account. They are required to be filed as soon as practicable, so as to prevent the unnecessary accumulation of costs occasioned by protracted delay, and to guard against the hazard of a bar by the statute of limitations, in the event of an abatement of the action on some technical ground not touching the merits.—Code, 1876, p. 160, Rule 12, §§ 3012–13.

The charge of the court was more favorable to appellant than the law authorized. The general rule is, that, in order to maintain an action of unlawful detainer, the plaintiff must have been in actual possession of the premises sued for, mere constructive possession not being sufficient. But when the action is

[Lehman, Durr &amp; Co. v. Collins.]

brought by a landlord against a tenant for unlawfully holding over, after the termination of the tenant's period of lease, the well settled rule applies, that the tenant's possession is that of the landlord, and he is estopped from disputing the fact of the landlord's prior actual possession.—Code, § 3697; *Lecatt v. Stewart*, 2 Stew. 474; *Taylor's Land. & Tenant*, §§ 705, 713, *et seq.* The defendant, Beck, lawfully entered into the possession of premises admitted by him to belong to Glenn, and his possessory interest as tenant had terminated, according to the finding of the jury. On demand in writing by the landlord, in such cases, and the refusal of the tenant to deliver possession, the action of unlawful detainer will lie. This action concerns exclusively the *right of possession*, and the estate, or merits of the title are forbidden to be investigated.—Code, §§ 3697, 3704; *Hightower v. Fitzpatrick*, 42 Ala. 597; *Townsend v. Van Aspen*, 38 Ala. 572.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

## Lehman, Durr & Co. v. Collins.

### *Bill in Equity by Judgment Creditor to Redeem.*

1. *Decrees against non-resident defendants; when not absolute.*—A decree in equity against a non-resident defendant, without personal service, who does not appear, is not absolute under the statute (Code of 1876, § 3830), until eighteen months from the rendition thereof; and within that period, the chancellor has the power, and it is his duty, on the filing of a petition by such defendant showing sufficient cause therefor, to open the decree and hear the cause upon the merits.

2. *Same; when notice of the petition essential.*—Where a non-resident defendant files his petition to open a decree rendered against him after such decree has been executed, and all proceedings in the cause have been terminated, and the parties have been dismissed the court, notice of the petition must be given to the parties having rights and interests, which would be affected by setting aside the decree and reopening the litigation, although the statute is silent as to such notice.

3. *Same; not set aside as matter of absolute right and of course.*—Under the present statute, a decree against a non-resident defendant, without personal service, should not be opened as a matter of absolute right and of course, on the presentation of a petition, but only upon sufficient cause shown. It should be shown that because the party had not actual notice of the suit and the opportunity to defend, an unjust decree had been pronounced against him; and if this is not shown, but it is apparent from the averments of the petition, that the decree is right and just in itself, and such an one as the court, on another hearing, would be bound to render, the decree should not be opened or set aside.

4. *Bill to redeem by judgment creditor; offer to redeem, to whom made.* While the statute requires that redemption of lands sold under a power

[Lehman, Durr &amp; Co. v. Collins.]

contained in a mortgage, must be made from the purchaser or those claiming under him; yet, if the purchaser subsequently alienates the lands purchased, the mortgagor or judgment creditor seeking to redeem, must have notice, or information of facts sufficient to put him on inquiry, that the purchaser has divested himself of the title, and who has succeeded to it, before he can be required to make the offer and tender to the alienee of the purchaser. In the absence of such notice or information, it is to the purchaser only he can apply for redemption, and an offer to redeem and tender made to him are sufficient.

5. *Registration of deed; effect of as notice.*—The registration of a deed operates as notice only of rights or claims derived from the grantor by whom the deed is executed, and not as notice of claims or rights derived from others not parties to the deed.

6. *Same.*—Where a purchaser of lands at a sale under a power contained in a mortgage subsequently sold the lands, but did not execute to his vendee any deed thereto, the latter taking a conveyance directly from the mortgagor, the registration of such conveyance does not operate as constructive notice to judgment creditors seeking to redeem the lands, of such vendee's claim or title to the lands, and to him they are not required to apply for redemption in the absence of actual notice.

7. *Offer to redeem; absence from the State of party to whom it should be made, dispenses with necessity therefor.*—The absence of the party to whom an offer to redeem and tender should be made, dispenses with the necessity of such offer and tender before filing the bill. In such case, the statute is complied with, if the offer and tender are made in the bill, filed within two years.

8. *Redemption of lands; what liens or claims the party seeking, must satisfy.*—While a judgment creditor, seeking to redeem lands sold under a power contained in a mortgage, is bound to satisfy every lien or incumbrance or claim for which the purchaser would be entitled to hold the lands as security, or to which a court of equity would subject them; this embraces only liens, legal or equitable, and claims capable of enforcement, and not secret trusts, void under the statute of frauds.

9. *Deposit of title deeds to lands as security, void under statute of frauds.* The doctrine of the English Court of Chancery, that a deposit of the title deeds to lands for the security of a debt is an equitable mortgage, is in violation of the statute of frauds and can not be maintained in this State.

APPEAL from Etowah Chancery Court.

Heard before Hon. H. C. SPEAKE.

The facts are stated in the opinion.

AIKEN & MARTIN, and RICE & WILEY, for appellant.

DENSON & DISQUE, *contra*.

BRICKELL, C. J.—The appellants, as judgment creditors of William T. Shook, filed the original bill in this cause to compel a redemption and conveyance to them of certain real estate, situate in the town of Gadsden, which had been sold under a power in a mortgage executed to Shook, and of which the respondent, now appellee, Conley, had become the purchaser. The bill avers that Conley “pretends to have contracted with one Collins, who resides in the State of North Carolina, and whose christian name is unknown to your orators, and can not



[Lehman, Durr &amp; Co. v. Collins.]

be ascertained by them by diligent inquiry, for the sale of the original store-room hereinbefore described, some months ago." They charge, upon information and belief, that "said Collins resides in the State of North Carolina, and is now absent from this State, and has no agent to represent him here in regard to said property," etc. The money to redeem was brought into court, and a tender thereof made to Collins, if it should be ascertained he was the party from whom the redemption should be made, accompanied with an offer to pay all lawful charges, etc. This bill was taken as confessed by Collins, after publication, and the cause progressed to a final decree, letting in the appellants to redeem and awarding a writ of assistance to put them in possession. Within eighteen months after the rendition of this decree, and after all proceedings in the cause had terminated, Collins filed in open court a petition to open the decree, and be let in to make defense.

The petition avers Collins' residence in North Carolina, the filing of the original bill, and the proceedings thereon. It is averred that Conley was without any interest in the real estate, at the time the appellants made to him the offer and tender to redeem, and it is further averred, that in March, 1874, the mortgagor, Shook, was indebted to certain persons in a sum exceeding two thousand dollars, to secure the payment of which he had deposited with them the title deeds to the real estate. This indebtedness was compromised at the sum of seven hundred dollars, for the payment of which Conley became the surety of Shook, on the agreement that if he had the debt to pay, the deeds should be turned over to him for his indemnity. Conley had the debt to pay, and the deeds were delivered to him. In November, 1875, he sold the real estate to one Lloyd, to whom the mortgagor made a conveyance. Soon after Lloyd sold the real estate to petitioner, the sale being prior to the offer and tender to redeem made by the appellants to Conley. The petition was not verified, and of its filing notice was not given the appellants. On the day of the filing, the chancellor made an order setting aside the former decree, restoring the cause to the docket, and allowing the petitioner to defend on the merits. At the succeeding term of the court the appellants moved the court to set aside the order at the previous term opening the decree, because it was made without notice to them; because the petition was not verified, and because no sufficient cause for opening the decree was shown. The motion was overruled, and at a subsequent term on a hearing, the chancellor rendered a decree declaring the appellants had not a right to redeem that part of the premises claimed by Collins, because they had not tendered the amount Conley had paid as the surety of Shook,

[Lehman, Durr &amp; Co. v. Collins.]

and for which the title deeds were deposited with him as security.

1. The statute provides the mode in which necessary or proper parties defendant to suits in equity, who may reside without the State, can be made parties defendant, and decrees obtained against them. Such a decree is not as to such defendants absolute, if they do not appear until eighteen months after its rendition. On the filing of a petition within that period, the chancellor has the power, and it is a duty, *upon sufficient cause shown*, to open the decree, and hear the cause upon the merits, as if no decree had been rendered.—Code, §§ 3830–31. The statute does not in express terms require that notice of the petition shall be given the adverse party. But notice to the parties in interest is an essential element of all judicial proceedings by which they are to be effected. From the mere silence of the statute as to notice, it is not to be presumed that an *ex parte* proceeding is intended.—*Brown v. Wheeler*, 3 Ala. 287; *Reid v. Jackson*, 1 Ala. 217; *Kirkman v. Harkins*, 1 Port. 22; *Wilburn v. McCalley*, 63 Ala. 436. The general rule of practice in a court of chancery is, that all petitions which are not of course, must be served upon the adverse party.—3 Daniel's Ch. Pr. 1711. If a final decree has been rendered, ulterior proceedings being necessary to its execution, and as to them the cause remaining *in fieri*, the filing of the petition in open court would operate as notice to all parties before the court. But when all proceedings are terminated, and the parties have been dismissed the court, notice of the petition must be given to the parties having rights and interests which would be affected by setting aside the decree, and re-opening the litigation. Without such notice it could not be known to them that further attendance upon the court was necessary, and they would not have the opportunity of sustaining the correctness of the former decree, and of protecting their rights.

2. Whatever may have been the right of a party against whom a decree was rendered without personal service, under former statutes, it is not under the present statute a matter of absolute right and of course, on the mere presentation of a petition, to open a decree which has been rendered against him. The decree, in the words of the statute, is to be set aside only *upon sufficient cause shown*. If it is not shown by the petition that the decree is prejudicial to the petitioner, and that on a hearing on the merits it will so appear, there is no reason for setting it aside and re-opening the litigation. A decree, right and just in itself, and which the court on another hearing would be bound to pronounce, ought not to be set aside at the mere will or caprice of a party affected by it. It should be shown that because the party had not actual notice of the suit, and

[Lehman, Durr & Co. v. Collins.]

the opportunity to defend, an unjust decree has been pronounced. If this is not shown, if, on the facts apparent on the face of the petition, the court would be bound to pronounce the decree which has been rendered, it would be not only vain, but the mere protraction of litigation to vacate it. This is not the purpose or policy of the statute. It is protection against erroneous and unjust judgments, the party could have avoided if actual notice had been given him, the statute intends to afford.

Upon a careful examination of the petition, we do not find any sufficient cause shown for opening the decree and letting the petitioner in to defend on the merits. No fact is stated showing the error or injustice of the decree, or a defense on the merits, or that on another hearing the court would not be compelled to render the same decree. On the contrary, it does appear clearly that the decree is not erroneous or unjust, and is the decree which ought to have been rendered on the merits of the controversy. The causes for opening it assigned by the petitioner are reducible to two, and may be thus stated: *First*, that the offer to redeem, and the tender of money for redemption, ought to have been made to the petitioner, Collins, or to his vendor, Lloyd, and not to Conley, the purchaser at the mortgage sale. *Second*, that Conley had the equitable right to tack to the sum bid at the mortgage sale the amount he had paid as the surety of the mortgagor, Shook, and for the security of which the title deeds to the real estate had been on deposit with him; and that to this equity Lloyd, the immediate vendee of Conley, had succeeded, and it passed to Collins on his purchase from Lloyd. That this sum was a *lawful charge* on the lands, and the tender made not embracing it, but embracing only the amount bid by Conley at the mortgage sale, with ten per cent. *per annum* interest thereon, was insufficient.

It is certainly true that Conley, by his purchase at the mortgage sale, and the conveyance to him by the mortgagee, became the owner of the mortgaged premises—of all the estate the mortgagor had in them. There remained in the mortgagor, or in his judgment creditors, the mere statutory right to redeem; a right which was lost if it was not asserted within the time, and on the terms, and in the mode prescribed by the statute. *Spoor v. Phillips*, 27 Ala. 193; *Morris v. Beebe*, 54 Ala. 300. Conley had full power to sell and convey, subject only to the right of redemption in the mortgagor and his judgment creditors; and after a sale and conveyance, all his right and title would vest in his vendee or grantee.—*Camp v. Simon*, 34 Ala. 126. Redemption must be then made from the party who has acquired the title. It is that the redemption is intended to acquire, and the statute requires that it should be made from the purchaser, or *any one claiming under him*.—Code of 1876,



[Lehman, Durr &amp; Co. v. Collins.]

§ 2881. The mortgagor or the creditor coming to redeem, must, however, have notice, or information of facts sufficient to put him on inquiry, that the purchaser has divested himself of title, and who has succeeded to it, before he can be required to make the offer and tender to the alienee or grantee of the purchaser, or to any one else than the purchaser. In the absence of such notice, or of such information, it is to the purchaser only he can apply for redemption, and it is his title he proposes to acquire. It is not shown by the petition that the appellants had any notice, or the knowledge of any facts which could have put them on inquiry, that Conley had made any sale of the real estate to Lloyd. The registration of the conveyance from the mortgagor to Lloyd seems to be relied on as operating constructive notice to the appellants of Lloyd's claim and title to the premises. The registry of a deed operates as notice only of rights or claims derived from the grantor by whom the deed is executed, and not as notice of claims or rights derived from others not parties to the deed.—*Bates v. Norcross*, 14 Pick. 224; *Tilton v. Hunter*, 24 Maine, 29; *LeNeve v. LeNeve*, 2 Lead. Eq. Cases, 129. The absence of the petitioner from the State dispensed with the necessity of making to him an offer and tender to redeem before filing the bill, and an offer and tender made in the bill filed within two years, was a compliance with the statute, if it is conceded that, under the facts of the case, to him the offer and tender ought to have been made. *Trimble v. Williamson*, 49 Ala. 525.

The remaining cause assigned for opening the decree, is the right of Conley, or of his vendee, to tack as a *lawful charge* the amount he had paid as surety of the mortgagor, Shook, and for the security of which payment the title deeds had been deposited with him. A creditor claiming redemption is bound to pay not only the amount bid for the lands, but all lawful charges the purchaser, or whoever claims under him, may have on and against the premises.

Every lien, or incumbrance, or claim, for which the purchaser would be entitled to hold the lands as security, or to which a court of equity would subject them, whoever comes to redeem is bound to satisfy.—*Couthway v. Berghaus*, 25 Ala. 393; *Grigg v. Banks*, 59 Ala. 311. But it is only liens, legal or equitable, claims capable of enforcement, the creditor coming to redeem can be required to satisfy. We do not deem it necessary to enter on the inquiry, whether it is shown with certainty that there was a deposit of the title deeds under such circumstances, that according to the doctrine of the English Court of Chancery, an equitable mortgage would have been created. That doctrine we can not recognize and enforce, without departing from the letter and spirit of our legislation, without embar-

[McBryde v. Rhodes.]

passing lands with secret trusts which would hinder their alienation, and opening a door for frauds on creditors. If the mortgagor had come to redeem, the right to hold the lands as a security because of the deposit of the title deeds, could not have been asserted and maintained against him, without a violation of the statute of frauds.—*Meador v. Meador*, 3 Heisk. (Tenn.) 562; *Gothard v. Flynn*, 25 Miss. 58; *Shitz v. Dieffenbach*, 3 Penn. St. 233; *Probasco v. Johnson*, 2 Disney (Ohio), 96. The deposit being a transaction resting wholly in parol, not capable of being enforced against the mortgagor, from it there can not arise a *lawful charge* against the lands.

The decree of the chancellor must be reversed, and a decree will be here rendered, vacating the order made by the chancellor on the petition to set aside the former decree; and the appellees, Collins and Conley, will pay the costs of this appeal, and the costs in the court of chancery accruing since the filing of the petition. The cause will be remanded to the court of chancery for such other and further orders, if any, as may be necessary.

## McBryde v. Rhodes.

### *Application to Establish Lost Record.*

1. *Lost Record; what evidence necessary to establish.*—Where, on the hearing of a petition in the probate court, to establish a lost record of proceedings, orders and decrees in said court touching the sale by an administrator of lands belonging to his intestate, and of the deed made by such administrator conveying the lands to the purchaser at such sale, the evidence failed to show that any petition was filed by the administrator praying an order of sale, or that any testimony was taken, or that any order of sale was granted, or that any report of sale, or of the payment of the purchase-money was made, or that the sale was confirmed, or that an order to make title was granted,—a decree of the court, in the absence of such evidence, establishing and substituting the record as prayed in the petition, is erroneous.

APPEAL from Conecuh Probate Court.

Tried before HON. F. M. WALKER.

The petition in this cause was filed by John Rhodes, the appellee, for the purpose of establishing a record of the proceedings, orders and decrees had and entered in said court relating to the sale of lands belonging to the estate of John McBryde, deceased, by William A. Northcutt, his administrator, to Joseph Lundy and John G. Guice, under whom the petitioner

[McBryde v. Rhodes.]

claims, and also of the deed conveying the lands to said purchasers, all of which are alleged to have been destroyed by fire. The petition was resisted by Mary J. McBryde and others, appellants, who are the heirs of the said John McBryde, deceased. On the hearing, the lower court rendered a decree establishing the record as prayed in the petition; and this decree is here assigned as error.

J. W. POSEY, for appellant.

G. R. FARNHAM, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The present case arose out of an application to establish a lost record, and the bill of exceptions affirms it contains all the evidence. We think the proof reasonably shows that John McBryde died the owner of the lands in controversy; that Northcutt was appointed his administrator; that he, Northcutt, sold the lands in controversy to the highest bidder; that Lundy & Guice became the purchasers; that they paid the purchase-money; that Northcutt as administrator made them a title in 1863, and that they, and those claiming under them, have ever since held possession of the lands. There is an entire absence of proof of every other averment in the petition, showing the authority of Northcutt to make the sale and conveyance. There is not a semblance of evidence that any petition was filed, praying an order of sale, that any testimony was taken, that any order of sale was granted, that any report of sale, or of payment of the purchase-money was made, or that the sale was confirmed, or an order to make title granted. These facts, and the contents of the petition, may be very difficult of proof, owing to the death of most of the parties who participated in them; but courts can find facts only on evidence before them. The Probate Court erred in the decree rendered.—*Bishop v. Hampton*, 19 Ala. 792; *Shorter v. Sheppard*, 33 Ala. 648; *Smith v. Wert*, 64 Ala. 34.

Reversed and remanded.



[Dothard v. Sheid.]

**Dothard v. Sheid.***Action on Attachment Bond.*

1. *Attachment bond ; its approval by the clerk.*—It is not necessary in an action on an attachment bond, for the plaintiff to aver that the bond had been approved by the clerk who issued the writ, as the obligors on the bond would be liable, if the bond was actually executed and delivered to the clerk, and by him received and filed, before he issued the process.

2. *Suit on attachment bond ; sufficiency of complaint.*—Nor is it necessary in such action to aver, *ipsis verbis*, that the attachment was sued out *without cause*, as this is implied from the averment that the attachment was wrongfully sued out.

3. *Same.*—Nor is it necessary in such action to aver that the attachment was levied on the plaintiff's property, as that is matter of evidence merely to establish the *quo modo*, and the *quantum* of damages.

4. *Same ; assignment of breaches ; what sufficient.*—In an action on an attachment bond the breaches assigned were, 1st, that the attachment was wrongfully sued out ; 2d, that it was vexatiously sued out ; 3d, that it was maliciously sued out ; 4th, that it was wrongfully and vexatiously sued out, and 5th, that it was wrongfully, vexatiously and maliciously sued out,—*held*, that the assignments of breaches were sufficient.

5. *Same ; sufficiency of complaint.*—A complaint in such action, which is in substantial compliance with the form prescribed in the Code for suits on bonds with conditions (Code of 1876, § 3009, Form 12), is sufficient ; but under such complaint, in the absence of specific averments claiming special damages, only general damages, or such as result necessarily and by implication of law from the issuance of the attachment, can be recovered.

6. *Same ; counsel fees ; when recoverable.*—In an action on an attachment bond, whether brought for the recovery of the actual damages sustained, or for the recovery of vindictive or exemplary damages, reasonable and necessary counsel fees incurred in defending the attachment suit, or in prosecuting or defending an appeal from the judgment rendered in that suit to this court, may be recovered.

7. *Same ; must be specifically averred.*—Such fees, however, while the proximate result of the wrongful suing out of the attachment, are not such damages as necessarily result therefrom, or as are implied by law ; and hence, they can not be recovered, unless they are specifically claimed in the complaint.

8. *Certificate of reversal ; when not competent evidence.*—A certificate of reversal issued by the clerk of this court, can only be looked to as authorizing the lower court to proceed to a new trial in the case to which it relates ; and hence, to prove the fact of such reversal on the trial of another cause, such certificate is not competent evidence, but a transcript from the records of this court, properly exemplified, is the best and only legal evidence of that fact.

9. *Suit on attachment bond ; what is competent evidence.*—In an action on an attachment bond the record of the attachment suit is admissible in evidence on behalf of the plaintiff.

10. *Same.*—Where one of the assignments of the breaches of the condition of the attachment bond in a suit thereon, is that the attachment was vexatiously and maliciously sued out, it is competent for the plain-

[Dothard v. Sheid.]

tiff to prove, that after the writ was sued out, the defendant, at whose suit it was issued, told the plaintiff that he had more money to spend on the law suit than the plaintiff had.

APPEAL from Calhoun Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was an action brought by James M. Sheid, the appellee, against William Dothard and G. C. Ellis, the appellants, and was founded on a bond executed for the purpose of obtaining an attachment, which was sued out of said court by Dothard against the appellee. After setting out the condition of the bond *in hæc verba*, the complaint proceeds as follows: "And the plaintiff says the condition of the said bond has been broken by said defendants in this: 1. Said attachment was wrongfully sued out; 2. Said attachment was vexatiously sued out; 3. Said attachment was wrongfully and vexatiously sued out; 4. Said attachment was maliciously sued out; 5. Said attachment was wrongfully, vexatiously and maliciously sued out; 6. Plaintiff has sustained costs and damages by the wrongful suing out of said attachment by the defendant, William Dothard, in the sum of five hundred dollars, and said defendant has failed to pay the same, or any part thereof, to plaintiff's damage as above stated." The appellants, defendants in the court below, demurred to the complaint, attacking the sufficiency of the assignments of the breaches of the condition of the bond, and also on the ground that the complaint fails to aver that the attachment was sued out without cause, or that it was levied on the property of the plaintiff, or that the bond was approved by the clerk of the court issuing the same. The court overruled the defendants' demurrer, and the cause was tried, as shown by the judgment-entry, "on issues joined," but the defendants' pleas are not set out in the record.

On the trial, the plaintiff read in evidence the bond sued on, and also the affidavit and writ in the attachment suit. It was also shown that at the Spring Term, 1877, of said court, Dothard obtained a judgment in the attachment suit against the plaintiff, from which the latter appealed to this court; and the plaintiff then offered in evidence the certificate of reversal issued by the clerk of this court in the attachment suit, to which the defendants objected, but their objection was overruled, the certificate was read to the jury, and they excepted. The plaintiff was also permitted to read in evidence, against the defendants' objection, the judgment-entry of a non-suit taken by Dothard at the Spring Term, 1879, of said court, in the attachment suit, and the defendants excepted. The plaintiff also read in evidence the final record in the attachment suit, in which was transcribed the certificate of reversal and the judgment of non-suit.

[Dothard v. Sheid.]

To the reading of that part of the record relating to the certificate of reversal and non-suit the defendants objected, and their objection was overruled, and they excepted. The plaintiff, after proving the value of services rendered by his counsel in the attachment suit in the Circuit Court, was also permitted to prove, against the defendant's objection, the value of the services rendered by his counsel in prosecuting said appeal in this court, and the defendants excepted. The plaintiff was examined as a witness in his own behalf, and testified, among other things, that after the attachment was issued he met Dothard and stated to him, that he wanted a settlement of the debt for which the attachment was issued (which was for the rent of land, as shown by the proceedings in the attachment suit); that the rent of the land had been paid by the repairs made on the rented premises, and that Dothard replied, that he would not allow any thing for repairs; and that he, "Dothard, had more money than the witness, Sheid, had to spend on the law suit." To that part of Dothard's reply above quoted the defendants objected, but the court overruled their objection, and they excepted. The defendants also reserved exceptions to charges given by the court at the request of the plaintiff, but these charges are not necessary to a report of the case.

The Circuit Court rendered judgment on verdict for the plaintiff, from which this appeal is taken; and the rulings of court on the demurrer to the complaint, and on the introduction of evidence on the trial above noted, and on the charges asked by plaintiff, are here assigned as error.

JOHN T. HEFLIN, for appellants.

DENSON & DISQUE, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—This is a suit on an attachment bond brought by the appellee against the appellants. A demurrer was interposed by the defendants in the lower court raising various objections to the sufficiency of the complaint.

The complaint, though very inartificially drawn, was in substantial compliance with the form prescribed in the Code for suits on bonds with conditions.—Code, 1876, § 3009, p. 703. There was no necessity for any allegation that the defendants refused to pay the amount of damages claimed. Nor was any averment necessary that the bond sued on had been approved by the clerk who issued the attachment. If the bond was received and filed by him, and he thereupon issued the process or writ of attachment, he will be estopped from afterwards deny-



[Dothard v. Sheid.]

ing his approval of it, and the obligors will be liable. It is sufficient to hold the obligors, if the bond was actually executed and delivered before the writ issued.—Drake on Attach. §§ 120–121; *Pearson v. Gayle*, 11 Ala. 278.

The breaches assigned were, 1st, that the attachment was *wrongfully* sued out; 2nd, that it was *vexatiously* sued out; 3rd, that it was *maliciously* sued out. Other averments were also made assigning these breaches conjunctively instead of severally. These assignments of breaches were sufficient under the authority of *Gabel v. Hammerwell*, 44 Ala. 336, a case which has now been acted on by the legal profession for over ten years, and which we are not inclined to disturb. It is not necessary to aver, *ipsis verbis*, that the attachment was sued out *without cause*. If it was wrongfully sued out, it must be implied that it was without cause.—*Sharpe v. Hunter*, 16 Ala. 765. And that it was levied on plaintiff's property was matter of evidence merely to establish the *quo modo* and the *quantum* of the alleged damage. Such levy was not required to be alleged in the complaint under the liberal form prescribed in the statute.

In suits on bonds with conditions, ordinarily it is only necessary to allege the date and execution of the bond by the defendant; to set out the condition in *hæc verba*, or in substance; to allege that the condition of the bond has been broken by the defendants; to state concisely the breach or breaches complained of, and to conclude with the averment that the plaintiff has thereby suffered damage.—Code, § 3009, Form No. 12. The form of complaint, however, laid down in the Code was designed only to cover *general* damages, or such as *necessarily* result, and which the law implies from the injury complained of, the defendant being presumed to be aware of the necessary consequences of his conduct, and therefore not liable to surprise in the proof of them.—2 Greenl. Ev. § 254. It has been expressly held not to cover *special* damages, or such as are not the necessary result of defendant's wrongful act.—*Lewis v. Paull*, 42 Ala. 136. In a suit on an attachment bond, if the attachment is wrongfully sued out, the statute limits the recovery of damages to such as the plaintiff has *actually* sustained. If *maliciously* sued out, as well as wrongfully, the jury may award vindictive or exemplary damages.—Code, 1876, §§ 3317–18. In either event reasonable and necessary counsel fees incurred in defending the attachment suit are recoverable as a part of the lawful damages.—*Higgins v. Mansfield*, 62 Ala. 267; *Seay v. Greenwood*, 21 Ala. 491; *Marshall v. Betner*, 17 Ala. 832. And though otherwise held by this court in its former decisions, it was settled in *Bolling et al. v. Tate*, 65 Ala. 417, that such damages also include counsel fees incurred in prosecuting or defending an appeal to the Supreme Court. Such

[Dothard v. Sheid.]

fees can not, however, be recovered as general damages. They are the proximate result of the wrongful suing out of the attachment, but they are not the necessary result of such wrongful act, or such damages as are implied by law. It may be that no counsel were necessary and none were employed. The attachment suit may have been dismissed before the entry of defendant's appearance, or he may have refused to defend it at all. We think, for this reason, that counsel fees in such cases can be claimed only as *special* damages, and must therefore be claimed as such specifically in the complaint.—2 Sedgwick Dam. (7th Ed.) p. 608, *note*; *O'Leary v. Rowan*, 31 Mo. 117; 2 Greenl. Ev. § 254; *Lewis v. Paull*, 42 Ala. 136.

A proper application of these principles shows that there was no error in overruling the demurrer to the complaint; but that there was error in permitting evidence of the value of counsel fees incurred in defending the attachment suit, in as much as they were not specifically claimed in the pleadings.

There was also error in admitting in evidence the certificate of reversal of the judgment of the attachment suit. This certificate, which was signed and transmitted by the clerk of the Supreme Court, could only be looked to as authorizing the lower court to proceed to a new trial in the case to which it relates. The best and only legal evidence of the reversal of such judgment by the appellate court was a transcript of its records properly certified or exemplified.—1 Whart. Ev. § 107; *Draughan v. Bank*, 3 Stew. 54; *Locke v. Winston*, 10 Ala. 849.

It was proper to admit in evidence the record of the attachment and proceedings thereon.—*Donnell v. Jones*, 17 Ala. 689. This record included the judgment of *non-suit* to the admission of which exception was taken. If the entire record introduced shows it was subsequently set aside by the court, no injury can be suffered by appellants. If not set aside, it was a discontinuance of the cause of action.

The testimony of the witness Sheid, that "Dothard said he had more money than the witness Sheid had to spend in the law suit," was competent to illustrate the *quo animo* of the attachment proceedings. Among the breaches assigned were the averments that the attachment had been vexatiously, and also maliciously sued out. Any conduct or language of the plaintiff in attachment tending to establish these averments was relevant evidence in an action on the attachment bond.

It is unnecessary to apply in detail these principles to the charges of the lower court. It appears plainly from them that the court erred to such extent as to require its judgment to be reversed, which is hereby accordingly done and the cause remanded.

## Chambers v. Ringstaff.

### *Statutory Action in Nature of Ejectment.*

1. *Patent ambiguity; what is.*—When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, or things, this is a patent ambiguity, or ambiguity apparent. In such case, the rule is clear, from which this court will not depart, that parol proof of what was intended by the contracting parties, will not be received.

2. *Latent ambiguity; what is, and how explained.*—A latent ambiguity exists, when, on the face of the paper, no doubt or uncertainty exists; but by proof *aliunde*, the language is shown to be alike applicable to two or more persons or things. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that, by which it is made to appear.

3. *Ambiguity belonging to an intermediate class.*—There is also an ambiguity recognized in cases involving principles, which are scarcely referable to either latent or patent ambiguities. It arises when, on mere inspection, there does not appear to be any uncertainty or ambiguity, and frequently grows out of a careless use of language, and it sometimes results from the many shades of meaning that usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which has been characterized as an intermediate class of cases, partaking of the nature of both latent and patent ambiguities. In such case, parol evidence may be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred.

4. *Land numbers; when judicially known.*—This court judicially know, that there is but one range 18 in this State, and that lies east of the basis meridian of St. Stephens; and that there is but one township 12 that bisects range 18, and that is north of the base of that survey.

5. *Description in conveyance; when it can be aided by oral testimony.* A description of lands in a conveyance, by sections, township and range, without mention of the State, county, land district, or government survey, in which the lands lie, may be aided by oral testimony showing, that when the conveyance was made, the grantor owned and resided on lands in a given county, in this State, which were known by the same numbers, as those employed in the conveyance. Aided by such proof, and in absence of proof, that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce the conveyance valid.

6. *Interpretation of a conveyance, aided by oral testimony.*—In such case, the interpretation of the conveyance and judgment upon its validity *vel non*, are questions for the court, while the finding of attendant facts and circumstances are functions of the jury.

7. *Mortgage of wife's statutory separate estate; when husband by joining in, conveys his life-estate on death of wife intestate.*—Where husband and wife executed a mortgage on lands belonging to her statutory separate estate, in the conveying clause of which the words "bargain and sell" are used, and the wife afterwards died intestate, leaving the mortgage unsatisfied, the life-estate which the husband took under the statute (Code of 1876, § 2714), in said lands, vested *eo instanti* in the mortgagee,



[Chambers v. Ringstaff.]

to the extent of his mortgage, by virtue of the statutory covenants therein, implied from the use of the words "bargain and sell."

8. *Intention of parties to mortgage; can not be testified to.*—It is not permissible for a party to a suit, who was also a party to a mortgage, to testify, as a witness, to the *intention* of the parties to such mortgage as to what lands were to have been thereby conveyed.

9. *General exception to evidence, part of which is legal.*—A general objection and exception to testimony, a part of which is legal and admissible, may be overruled, although another part thereof may be illegal and inadmissible.

#### APPEAL from Montgomery Chancery Court.

Tried before Hon. JOHN P. HUBBARD.

This suit was brought by W. W. Ringstaff against John W. Hicks, for the recovery of a tract of land described in the complaint by its survey numbers, and as being in the county of Montgomery, and State of Alabama. Before the trial, W. K. Chambers and Robert L. Knight, on their own motion, were made parties defendant, as landlords. On the trial, "it was admitted by both parties, that the land sued for and mentioned in the complaint was, prior to the year, 1873, a part of the statutory separate estate of Mrs. E. D. Knight, who was, at the time, a married woman, the wife of one Robert L. Knight, one of the defendants to this suit, and that said Mrs. E. D. Knight continued to be the wife of said Robert L. Knight up to the time of her death, intestate, which occurred after the first of January, 1874." The plaintiff then offered in evidence a mortgage executed by the said Robert L. Knight and E. D. Knight to the plaintiff, dated February 21, 1873, to which the defendants objected on the grounds (1), that it was void for uncertainty and (2), that it did not describe the lands sued for. Thereupon, the plaintiff was examined as a witness on his own behalf, who testified, against the defendants' objection, that at the time of the execution of the mortgage, the said Robert L. Knight and his wife, E. D. Knight, were living on the land mentioned in the complaint, which was the property of the said E. D. Knight at that time, and that said land was the land intended to be conveyed by said mortgage. The defendants moved to exclude the testimony of said witness from the jury, but the court overruled the motion, and they excepted. The court then allowed the plaintiff to read said mortgage in evidence, and the defendants excepted. In the conveying clause of the mortgage, the words "bargain and sell" are used. A fuller description of the mortgage is given in the opinion. The defendant offered to prove, that after the law day of the mortgage and before the commencement of this suit, the debt secured by said mortgage had been paid and discharged; but, on plaintiff's objection, the court refused to allow them to make such proof, and they excepted. This being all the evidence, the court, upon

[Chambers v. Ringstaff.]

the request in writing of the plaintiff, charged the jury, that, if they believed the evidence, they should find for the plaintiff, to which charge the defendants excepted. There was a verdict and judgment for the plaintiff, and the defendants bring the cause to this court by appeal, assigning as error, the several rulings to which exceptions were reserved.

GUNTER & BLAKEY, and WATTS & SONS, for appellants.—1. When the mortgage was executed, the lands mortgaged constituted a part of the statutory estate of Mrs. Knight. Such a mortgage is absolutely void, and can not convey any title out of the wife.—*Garrett v. Lehman*, *Durr & Co.*, 61 Ala. 391; *Conner v. Williams*, 57 Ala. 134; *Gilbert v. Dupree*, 63 Ala. 331.

2. But the mortgage on its face was void as a conveyance of lands. It does not show in what county or state the lands are located. It merely gives parts of sections, township and range, without any other description, which would authorize parol testimony to show the intention of the makers of the mortgage. There are at least two, if not more, United States surveys, having sections, township and range precisely like those set forth in this mortgage. Such a description is void.—*Long v. Pace*, 42 Ala. 495; *Tarver v. Com. Court*, 25 Ala. 480; *Holmes v. Evans*, 48 Miss. 247; *Bowers v. Andrews*, 52 Miss. 596; *Cogburn v. Hunt*, 54 Miss. 675; *Brown v. Guice*, 46 Miss. 299; *Fuller v. Fellows*, 30 Ark. 657; *Cochran v. Utt*, 42 Ind. 267; *Murphy v. Hendricks*, 57 Ind. 593; *Boyd v. Ellis*, 11 Iowa, 97; *Hughes v. Wilkinson*, 35 Ala. 453. The court is bound to take judicial knowledge of the U. S. surveys in this State, and that there are at least two such surveys, in which the same numbers of sections, township and range appear.—*Tarver v. Com. Court*, *supra*; *Murphy v. Hendricks*, *supra*. There is, therefore, a patent ambiguity in the mortgage, which can not be aided by parol evidence.

R. M. WILLIAMSON, *contra*.—1. Parol evidence was clearly admissible in aid of the description of the lands in the mortgage.—*Doe v. Hardy*, 52 Ala. 291; *Hawkins v. Hudson*, 45 Ala. 482.

2. The mortgage, though void as a conveyance by Mrs. Knight, is valid as to the husband. On the death of his wife, intestate, Knight took a life-estate in the land, under the statute. There is an implied warranty from the words "bargain and sell" used in the mortgage, and this warranty is an estoppel by deed, and is good at law. His deed is good so far as his interests are concerned, and he will not be permitted to avoid such deed by setting up an after acquired estate.—Bigelow on

[Chambers v. Ringstaff.]

Estoppel, 340; 25 Ill. 383; 5 Stew. & Por. 426; 4 Porter, 141; 21 Ala. 91; *Chapman v. Abraham*, 61 Ala. 108.

STONE, J.—There can be no question that the plaintiff below showed a right of recovery in this case, if the description of the land in the mortgage is not too uncertain to maintain the action.—*Chapman v. Abraham*, 61 Ala. 108; *Slaughter v. Swift*, 67 Ala. 494.

It is contended for appellant that the mortgage made by Knight and wife to Ringstaff is void for uncertainty. That mortgage is the title under which Ringstaff claimed. The argument is, that because the land is only described by its survey-numbers of section, township and range, without reference to the State or county, or basis meridian, it is void for uncertainty. The formula of the argument is, that courts take judicial notice of the Government surveys of the United States, and therefore we judicially know that the description employed in the mortgage under discussion, designates with equal clearness many tracts of land found in the many Government surveys. This, it is contended, raises the question of patent ambiguity, which the authorities say can neither be explained nor made certain by parol proof. The argument states the rule correctly, and the question arises, does this case fall within the rule?

In *Comm'r's Court of Russell v. Tarver*, 25 Ala. 480, and in *Long v. Pace*, 42 Ala. 495, the question arose on pleadings. In each case the description was by section, township and range, without any averred fact in aid of the description. There is but one tract of land in the State of Alabama which corresponds to the description given in either of the cases above mentioned, as we understand those cases. In the last case, the range given is evidently 28, although stated at one place as range 8. In each case this court ruled that the description was too indefinite, and that the pleading was fatally defective for uncertainty. In the last case, which was a chancery suit, there was a remandment of the cause, which would not have been ordered, unless the defect was considered amendable. To the same effect are the following cases: *Cochran v. Utt*, 42 Ind. 267; and *Murphy v. Hendricks*, 57 Ind. 593. *Boyd v. Ellis*, 11 Iowa, 97, and *Holmes v. Evans*, 48 Miss 247, are somewhat different.

The distinction between latent and patent ambiguity has long existed, and the general rule applicable to each class of cases should not be disturbed. When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things etc., this is patent ambiguity, or ambiguity apparent. In such case, the rule is clear, and we do not wish to depart from it, that parol proof of what was intended by the contract-



[Chambers v. Ringstaff.]

ing parties will not be received. Latent ambiguity exists, when, on the face of the paper, no doubt or uncertainty exists, but by proof *aliunde*, the language is shown to be alike applicable to two or more persons, things etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up, by the same character of proof as that by which it is made to appear. These are familiar elementary principles. But there are cases involving principles, which are scarcely referable to either of these heads. They may be styled exceptional shadings of patent ambiguity. They arise, when on mere inspection, there does appear to be an uncertainty or ambiguity. This frequently grows out of a careless use of language, and sometimes results from the many shades of meaning usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which Mr. Justice STORY has characterized as an intermediate class of cases, partaking of the nature both of latent and patent ambiguity. That learned jurist, in *Peisch v Dickson*, 1 Mas. 9, says: "In such a case I should think parol evidence might be admitted, to show the circumstances under which the contract was made, and the subject-matter to which the parties referred." He illustrates his views as follows: "The word 'freight,' has several meanings in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board of the ship, or an interest in the earnings of the ship." He does not state in what manner or form the proof should be made, to explain this apparent uncertainty. In the case of *Smith v. Doe, ex dem.* Lord Jersey, 2 Brod. & Bing. 473, 550—a case before the House of Lords—BAYLEY, J. employed the following language: "But I apprehend that in judging of the true intent and meaning of the indenture of July, 1757, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settlor there had. The settlor has used the indefinite words, 'a power of re-entry.' By showing, as I do, that there are many such powers, I show that there is an ambiguity in those words, either latent or patent, [it was clearly patent, for it was a matter of law, judicially known to the court, that there were several kinds of powers of re-entry] and may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settlor, and in what sense she used those words? . . . I am not offering declarations of what the party said she meant; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it; but, by

[Chambers v. Ringstaff.]

showing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the House to judge what, in legal construction, was her meaning. . . . If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will; and does not the construction vary, in some cases, according to the estate? If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to show what interest I had in the premises? For, if I was tenant in fee, he will take an estate for his own life; if I was tenant in tail, or for life only, he will take for mine. If a man bequeath me 10,000£ 3 per cent. consols, it will be a specific legacy if he have that stock at the time; not specific, if he have it not. Evidence is, therefore, admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result." See also, 2 Phil. Ev., Ed. 1859, p. 747, note, 515. In note 1 to 2 Bigelow's Jar. on Wills, page 424, is this language: "Observe that in all the above cases, the parol evidence is not adduced to show that the testator actually intended the devise to have the operation which is given to it, but merely to supply facts from which the court infers such to be the intention."

The present statutory real action was instituted by Ringstaff, and he avers that the lands sued for are situate in Montgomery county, State of Alabama. The title on which plaintiff relied for recovery is a mortgage executed to him by Knight and wife in 1873. It was admitted in the court below that the lands sued for were, when the mortgage was made, the statutory separate estate of Mrs. Knight, and that, before this suit was brought, she died intestate, leaving her husband surviving her. Under the statute, Code of 1876, § 2714, Mr. Knight took an estate in the realty of which his wife died seized, and intestate, for the term of his life, and that interest vested *eo instanti* in Ringstaff to the extent of his mortgage, by virtue of the statutory implied covenants contained therein, unless the mortgage is void for uncertainty in the description of the land.—*Chapman v. Abraham*, 61 Ala. 108. The description of the lands in the mortgage, as we have said, is only by section, township and range. It calls for parts of sections 7 and 17, in township 12, range 18. Nothing is said of the State, county, land district, or Government survey in which the lands lie. Now, we judicially know that there is but one tract of land in Alabama which corresponds with this description. There is but one range 18 in the State, and that lies east of the basis meridian of St. Stephens. There is but one township 12 that bisects range 18, and

[Chambers v. Ringstaff.]

that is north of the base of that survey. In aid of the description in the mortgage, there was oral testimony given to the jury, that when the mortgage was made, Mrs. Knight owned, and she and her husband resided on lands, situate in Montgomery county, Alabama, known by the same numbers as those employed in the mortgage. There is no proof that either of them owned any other lands, either in Alabama or elsewhere. It was admitted that the lands sued for had been the property of Mrs. Knight. Now, if it be conceded that the unaided description of the lands given in the mortgage is too uncertain, because it equally describes other lands in other Government surveys outside of the State, how stands the question, when it is shown that Mrs. Knight owned and occupied the lands thus numbered, which are in Alabama, and there is an absence of proof that either she or her husband owned or claimed any other lands, either in this State or elsewhere? It would be very unreasonable to presume they intended to convey lands they had no claim to. We rather presume they intended to convey lands they owned. Doubtful terms of a contract are construed most strongly against the grantor or promissor, *ut res magis valeat quam pereat*. We hold, then, that when it was admitted, or found by the jury, that Mrs. Knight owned the lands sued for when the mortgage was made, in the absence of other proof that she or her husband owned or claimed other lands falling within the description, it then became the duty of the court to pronounce the mortgage a valid conveyance. We wish not to be misunderstood. The interpretation of the mortgage, and judgment upon its validity *vel non*, were questions for the court, while the finding of attendant facts and circumstances were functions of the jury. Applying this principle to this case, if Mrs. Knight's ownership of the land in controversy; her possession, etc., were only shown by the ordinary methods of proof, without documentary evidence of title in her, then the charge should be, if the jury find the fact of ownership etc., then the mortgage is not void for uncertainty. We make this statement, to prevent the blending and confusion of the powers of the jury with those of the court.

It was not permissible for Ringstaff, as a witness, to testify to the *intention* of the parties to the mortgage. That pertained to the office of interpretation—the duty of the court—aided by ascertained, attendant facts, as we have shown above. But the witness gave this testimony in connection with other testimony clearly legal, and the objection and exception were to it as a whole. The court did not err in overruling the objection.—1 Brick. Dig. 886, § 1186.



[State of Alabama v. Lott.]

The charge of the court was in accordance with the views above expressed.

Affirmed.

## State of Alabama v. Lott.

### *Suit by the State on Bond of Tax Collector.*

1. *Tax collector; with what amount chargeable, and to what credits entitled.*—The tax collector, on his settlement with the auditor, is *prima facie* chargeable with all the taxes shown by the assessment book to be due the State; and the only uncollected taxes for which he can be allowed credit, are those contained in the lists of errors and insolvencies reported to, and allowed by the court of county commissioners, and the taxes for the payment of which lands were sold by him; and in the latter case, he must account for the proceeds of sale.

2. *Same; failure to collect a breach of his official bond.*—The duty of collecting the taxes is as imperative on the collector as is the duty of honestly accounting therefor, when collected; and a failure to collect, within the period prescribed by law, the taxes which, under the law, he is required to collect, is a breach of the condition of his official bond, equally with a failure to pay over the taxes when collected.

3. *Same; § 414 of Code of 1876 construed; when final settlement must be made.*—Under section 414 of the Code of 1876, it is the duty of the collector, on or before the first day of May of each year, to make a final settlement with the auditor of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof; and a failure on his part to make such settlement and to pay over such balance on or before that day, whether resulting from his want of fidelity in accounting for the money collected, or from his want of diligence in collecting, is a breach of the condition of his official bond, casting upon the obligors the duty and liability of making compensation for any injury sustained therefrom by the State.

4. *Interest; what it is and when recoverable.*—Interest in this State has long been regarded, not as the mere incident of a debt, attaching only to contracts, express or implied, for the payment of money, but as compensation for the use or for the detention of money. Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident.

5. *Same; when recoverable from tax collector.*—Where a tax collector fails to make a final settlement with the auditor, on or before the first day of May, of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof, as required by section 414 of the Code of 1876, he and the sureties on his official bond are liable for interest from that day on the balance then due from him to the State on account of such taxes.

6. *Auditor has no authority to waive payment of interest due from tax collector.*—The auditor, in making a settlement with a tax collector, has no authority to waive the payment of any interest which the collector may owe the State, or to release him from liability therefor.

APPEAL from Mobile Circuit Court.

Tried before JOHN ELLIOTT, Esq., Special Judge.

[State of Alabama v. Lott.]

This was a suit on the official bond of Elisha B. Lott, as tax collector of Mobile county, brought by the State of Alabama against him, and Nelson W. Perry and others, his sureties on said bond, and was commenced on the 28th October, 1880. On 15th June, 1881, a demurrer to the complaint as originally filed, having been sustained, the plaintiff filed an amended complaint. The complaint as amended contains ten assignments of breaches of the condition of the bond, all of which are based on the failure of Lott to make final settlements with the auditor on the first days of May, 1879 and 1880, of the taxes for the years 1878 and 1879, for each of which years balances are claimed to be due from him as such collector, and also interest thereon from the first days of May, 1879 and 1880 respectively. The pleadings are lengthy, and, as the questions decided by the court were raised on the trial, as well as on the pleadings, it is unnecessary to set them out. On the trial the plaintiff read in evidence the bond sued on, which was in the form prescribed by the statute; and also the original abstracts of the assessments of real and personal property and polls in Mobile county for the years 1878 and 1879, which were returned and certified to the auditor by the judge of probate, and which show the taxes assessed for State purposes for each of said years.

“The defendants then introduced evidence showing, that on the last Saturday in each month from October, 1878, to January, 1881, inclusive, defendant, E. B. Lott, made a report under oath to the judge of probate of Mobile county of the taxes for the year 1878, collected by him during such months, and at the same time paid over to the State treasurer every dollar of such State taxes actually collected by him during such month (except the school fund money and poll taxes, which he duly paid to the officer authorized to receive the same), first deducting the commissions and fees allowed him by law; and that on the 14th day of February, 1881, he had a final settlement and accounting with the auditor of the State for the whole amount of such State taxes for 1878, as the same was charged against him on the books of the auditor, and on the same day paid to the treasurer of the State \$172.72 in full payment of taxes due from the County of Mobile for the year 1878, according to the auditor's certificate; also, that on the last Saturday in each month from October, 1879, to April, 1881, inclusive, said Lott made a report under oath to the judge of probate of Mobile county of the taxes for the year 1879, collected by him during each month, and at the same time paid over to the State treasurer every dollar of such State taxes actually collected by him during each month (except the school fund money and poll taxes, which he duly paid to the officer authorized to receive the same), first deducting the commissions and fees allowed him

[State of Alabama v. Lott.]

by law; and that on the 27th day of May, 1881, he had a final settlement and accounting with the auditor of the State for the whole amount of such State taxes for the year 1879, as the same was charged against him on the books of the auditor, and received from the auditor a certified transcript from such books showing that he had made an over-payment of \$95.22 on such taxes for the year 1879, and that such amount was carried to the credit of said Lott for the year 1880." The evidence also showed the amounts paid by Lott to the State treasurer on the taxes for each of the years 1878 and 1879, *prior to*, and also the amounts of said taxes paid by him to the State treasurer *after*, the first days of May, 1879 and 1880, respectively, and the credits to which he was entitled for "errors and insolvencies," and for taxes for which lands were sold and bid in by the State, and for commissions to himself and the assessor, for each of said years.

It was also shown by the evidence, that no charges of interest against Lott were made on the books in the auditor's office, and that on the settlements which Lott made with the auditor, the latter did not charge up to, or collect from, the former any interest whatever, but that the settlements were made "by the said Lott's paying the amount of the principal of said taxes for 1878 and 1879, without taking into account interest on any sum." There was also evidence tending to show that the auditor did not remit or intend to remit the right of the State to interest, in the settlements made by him with Lott. The bill of exceptions then states: "There was no evidence of any wrong conduct or default on the part of said E. B. Lott in the matter of the collection of said taxes for the years 1878 and 1879, other than what is to be inferred, if any, from the fact of the non-collection and non-payment to the State at earlier dates than the payments were made. Nor was there any evidence tending to show why the taxes for 1878 and 1879, paid after the first day of May, of 1879 and 1880, respectively, by said Lott, were not collected and paid prior to the times they were collected and paid." It was also shown by the evidence, that the defendants paid all the costs of this case prior to the amendment of the complaint.

This being all the evidence, the plaintiff asked the court in writing to charge the jury, among other things, (1) that if they believe all the evidence, they must find for the plaintiff; (2) that the State taxes are due from the tax collector on the first day of May of the year following that for which the assessment is made, and that the State is entitled to recover interest on all taxes not paid by that day, unless some legal excuse is shown by the collector for the non-payment; and (3) that the auditor has no power to remit or release the right of the State to inter-



[State of Alabama v. Lott.]

est. The court refused these charges, and then charged the jury, at the written request of the defendants, "that if they believe all the evidence, they should find for the defendants," and the plaintiff excepted. There was a judgment for the defendants, from which the plaintiff appealed, and here assigns as error, among others, the rulings above noted.

GUNTER & BLAKEY, and MACARTNEY & CLARKE, for appellant.—(1). The taxes are due from the tax collector to the State on the first day of May of each year, and he is then conclusively presumed to have collected such as he does not show by legal excuse are uncollectible.—Code of 1876, §§ 414 *et seq.*; *Timberlake v. Brewer*, 59 Ala. 108. There is no substantial difference between the statute of 1868, under which the decision in *Timberlake v. Brewer*, *supra*, was made, and §§ 414 *et seq.* of the Code of 1876. Under each a *final* settlement is to be made on the first day of May of each year. It is no legal excuse for a failure to make such settlement at that time, that the collector did not collect, as it was his business to collect, and no legal excuse is given for not doing so. (2). The State is entitled to interest on taxes not collected and paid over by the first day of May succeeding the tax year.—Code, § 2089; *The People v. New York*, 5 Cowen, 331; *Langdon v. Castleton*, 30 Vt. 285; *Chevallier v. State*, 10 Texas, 315. (3). The auditor had no power to remit the interest due from Lott to the State, or to release him from liability therefor.—*Hæhnlen v. Commonwealth*, 13 Penn. St. 617; *Van Dyke v. The State*, 24 Ala. 81; *McElrath v. United States*, 12 Otto, 426; *Cooke v. United States*, 91 U. S. 397; *Bayne v. United States*, 93 U. S. 642; *United States v. Bank of Metropolis*, 15 Peters, 377; *State v. Brewer*, 61 Ala. 318. (4). The auditor, in making the settlement, made a mistake in not charging interest, which does not prejudice the State.—*State v. Brewer*, *supra*. The principal was not paid, because the payments should have been applied first to payment of interest.—*The People v. New York*, *supra*. But even if it were paid, it was paid after suit brought, which does not stop the action for interest.—*Fishburne v. Sanders*, 1 Nott & McCord, 242.

BOYLES, FAITH & CLOUD, *contra*.—(1). The revenue law of 1863, under which *Timberlake v. Brewer*, 59 Ala. 108, was decided, is very different in its provisions touching the settlement by tax collectors with the auditor, from the Code. Under the former, on a final settlement with the auditor, the tax collector is required to pay to the treasurer "the balance of taxes *due* from the tax payers in his county;" while under the Code (§ 414), on such settlement he must pay to the treasurer "the

[State of Alabama v. Lott.]

balance of the taxes *received or collected* from the tax payers in his county." The change thus made avoids the presumption that, after the first of May, the collector had collected the *whole* amount of the taxes, as decided in the case *supra*. The taxes remaining uncollected on the first of May are not lost to the State, nor is the collector required to pay them out of his own funds; but he may proceed with the collection of taxes afterwards and account therefor monthly. This provision is a part of the condition of the bond, and it is satisfied when the collector pays over on the first of May the taxes *received or collected* by him. This is what the appellees stipulated to do, and what has been done, as shown by the evidence; and their liability can not now be enlarged by construction or implication. *Van Epps v. Walsh*, 1 Woods C. C. R. p. 606; *Johnson v. Flint*, 34 Ala. 673; *Haden v. Brown*, 18 Ala. 641; *Leggett v. Humphreys*, 21 How. (U. S.) 75; *United States v. Knight*, 14 Peters, 301; *Douglass v. Douglass*, 21 Wall. 98. Interest was therefore not recoverable in this case. (2). But on another ground interest is not recoverable. If, under the Code, Lott was required to pay the whole balance *due* from the tax payers on the first of May, his failure to do so would have been a breach of mere official duty, and only such damages as are commensurate with the breach could be recovered. No interest could accrue until the "compensation" for such default had been *estimated in money*. And then interest would be chargeable only upon such "*estimated compensation*," and not on the amount *due* from the defaulting tax payers. Such an amount can not, in any just sense, be said to be the "*estimated compensation*" for such breach.—Code of 1876, §§ 2088, 2089; *Perry Co. v. Railroad Co.*, 58 Ala. p. 569. (3). The whole amount of the principal has been paid. The money was accepted as payment and full settlement of the *principal*; no interest was charged on the auditor's books, and no payment was applied to interest, but *expressly* applied to the *payment* of the *principal*. This suit now being for interest merely, we submit that it can not be maintained after payment of principal.—*Tillotson v. Preston*, 3 Johns. 228; *Southern R. R. Co. v. Town of Moravia*, 61 Barb. 180; *Stevens v. Barringer*, 13 Wend. 639; *Gillespie v. Mayor*, 3 Edwards' Ch. 512; *Jacot v. Emmett*, 11 Paige, 142; *Bank v. Mayor*, 4 Hun. (N. Y.) 429; *American Bible Society v. Wells*, 68 Me. 572; *S. C.*, 28 Am. Rep. 82.

BRICKELL, C. J.—Taxes for the current year are due on the first day of October. Until that time, of the tax payer they are not demandable. From that time until the first of January succeeding, the collector has the right to demand them, and on the tax payer rests the duty of paying on demand. The col-

[State of Alabama v. Lott.]

lector, after having given thirty days notice, is required to attend in each precinct of the county, at the place of voting, at least twice, during the period intervening from the first of October to the first of January, for the purpose of receiving the taxes. On the first of January, if the tax payer has failed to pay, the taxes become *delinquent*; he is subject to charges and penalties, and to compel payment the collector may resort to the levy and sale of property, real or personal. During the first week in January the collector must account to the auditor, under oath, for the whole amount of State taxes by him collected up to that date, first deducting the commissions and fees allowed him by law. On or before the first of May, "he must make a final settlement with the auditor, and pay over to the treasurer the balance of taxes received or collected from the tax payers in his county; and he must also account to the auditor, and pay over to the treasurer, all moneys received by him from sales of land, and account to the auditor for lands bought in for the State."

The book of assessment of taxes, after the assessment has been examined, and errors, if any, corrected by the court of county commissioners, is by the judge of probate delivered to the tax collector. The delivery, it is intended, must be made before the first day of October. The book shows the name of each tax payer, so far as known, the taxes assessed against him, and whether the tax is assessed on real or personal property, and the poll tax, if any, is assessed. In the event of a tax upon property the owner of which is unknown, the property and the amount of the State tax is shown by the book of assessment. If, in the course of the performance of the duty of collection, there are errors in assessment discovered, or there are persons from whom the collector is unable to make the taxes assessed, a statement or list of such *errors and insolvencies*, as they are termed in the statute, he is bound to report to the court of county commissioners at the April term of the court. After examination of the list or report, so far as correct the court allows it, and the probate judge having certified the lists as allowed, the auditor is required to give the collector a credit therefor on his final settlement.

The assessment book delivered to him by the judge of probate, is the warrant and authority of the collector to receive and to collect the taxes. *Prima facie*, when the time appointed for him to collect has expired, he becomes chargeable with all the taxes shown by it to be due to the State.—*Timberlake v. Brewer*, 59 Ala. 108. Every agent or trustee charged with the duty of collecting debts, becomes chargeable with such debts upon the expiration of a reasonable time for collection, there being evidence of the ability of the debtor to pay. If there be



[State of Alabama v. Lott.]

any sufficient reason for the failure to collect, the *onus* of proof rests upon him. The default is shown *prima facie*, when it is shown that he received the evidence of the debts, assumed the duty of collecting; the ability of the debtor to pay, the opportunity for the performance of the duty having been afforded, in the absence of all evidence in explanation, the conclusion is irresistible, either that the debts have been collected, or that the failure to collect is negligence, a want of the diligence the agent or trustee was bound to exercise. The statute having prescribed a particular period within which the collection of taxes must be made; having afforded the collector ample remedies to compel payment within that period; and having provided him with a remedy to obtain credit for all taxes which are uncollectible, the result is inevitable that on the expiration of the appointed period, he is chargeable with all taxes appearing on the assessment book, it is not shown by the lists of *errors and insolvencies* were not collected. There is no authority to relieve him from liability for any other taxes, with the exception of taxes on lands sold for the non-payment of the tax assessed, and then he is chargeable with the proceeds of sales. Whether he has collected the taxes, other than such as are embraced in the list of *errors and insolvencies*, can not affect his liability. The condition of his official bond is, that he will perform *all the duties of the office which are, or may be, required by law*. The bond operates as a security, not only for honesty in paying over the moneys actually received, but for skill and the measure of diligence the law exacts in collecting. The real intent of the official bond, expressed in the few words in which the statute requires the condition to be written, is, that the collector will, with fidelity, skill and diligence, perform the duties of the office, and keep inviolable the trusts reposed in him. The condition of the bond is broken, whenever there is default in the performance of duty, not capable of excuse, or for which excuse is not shown. Whatever of damage or injury accrues to the State from the breach, is at that instant recoverable, and the duty and liability to make compensation then rests upon the several obligors, principal and sureties. The failure to collect is a breach of the bond, equally with a failure to pay over the moneys collected. The duty of collecting is as important as the duty of paying honestly. The one duty is precedent to the other.

The statute contemplates, indeed, in express terms requires, that on the first day of May of each year the collector shall make a final settlement with the auditor of the taxes of the preceding year. Whatever of taxes he has not paid previously, must then be paid, or an account of them given. The taxes which are not to be paid at that time, and for which an account

[State of Alabama v. Lott.]

is then to be given, are taxes on lands which the collector has sold, and lands bought in by the State for the taxes. As to these, he accounts for the proceeds of sale; but for all other taxes, save *errors and insolvencies*, he must account in money. If he has not collected them, the failure is attributable to his negligence, and for negligence he is as liable as for moneys received. The payment of them can not be delayed without converting the settlement into a partial, instead of a final settlement; and for a partial settlement at that time the law furnishes no authority. The partial settlement, and the only partial settlement contemplated; is the settlement the collector is required to make during the first week in January.

There is, as is urged by the counsel for the appellee, a change in the language of the present revenue law from that found in former laws. The former laws, in express words, required that on the final settlement with the auditor, the tax collector should pay over to the treasurer the balance of the taxes *due the State*. The present statute employs the words "the balance of the taxes *received or collected* from the tax payers." These words are employed in connection with an imperative requisition that the settlement shall be *final*, which it can not be, if the liability for which the collector accounts, is only for the moneys actually collected by him, and he gives no account, is held to no liability for the taxes he has not collected, the failure to collect, being the result only of negligence and the violation of official duty. Besides, it would empower the collector to select his own time for the collection of taxes, instead of collecting them within the period appointed by law. It would enable him to defer, and to fix a time for a final settlement, variant from that the law prescribes in terms which are imperative. It was doubtless supposed by the legislature, that the collector would be diligent in the performance of duty, and would within the time prescribed, a period of seven months, have collected the taxes, and be ready to pay them to the treasurer. But if he has not collected them, if he has neglected his duties, and by the neglect made himself chargeable with them, a legislative intention to acquit him of liability can not be deduced from these words. The intention was, that if he had disappointed the expectation of the legislature, if he had not performed his duty, he should account for the neglect of duty according to the condition of his bond.

The collector being chargeable on the first day of May, for all taxes he has not previously paid into the treasury, other than such as are embraced in the lists of *errors and insolvencies*, or such as are accounted for in consequence of the sales of lands, the point of contention between the parties is, whether interest attaches to the liability. Interest, in this State, has

[State of Alabama v. Lott.]

been long regarded not as the mere incident of a debt, attaching only to contracts, express or implied, for the payment of money, but as compensation for the use, or for the detention of money. Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident.— *Whitworth v. Hart*, 22 Ala. 343; *Boyd v. Gilchrist*, 15 Ala. 849; *James v. Governor*, 1 Ala. 605. The true and just doctrine is expressed in *Dodge v. Perkins*, 9 Pick. 365, approved in *Boyd v. Gilchrist*, *supra*, that, “the inquiry is, whether the party has done all that the law required of him in the particular case, whether acting on his own account, or as agent, executor, administrator, or trustee for others. If he has, he is not accountable for interest; if he has not, he is accountable for it, as a compensation for the non-performance of his contract.” The duty resting upon the collector was the payment of the taxes on the first day of May. The official bond was a security for the performance of the duty at that time; its condition, though written in general words, embodied a pledge to perform the duty. The failure to perform was a breach of the obligation of the bond, damning the State. The damage was the failure to receive in money on that day, the moneys which the collector ought to have paid. The moneys are detained, and for the detention compensation must be made. The duty of compensation on the part of the collector, and the right to it on the part of the State, are the same in character and degree, as if the collector had withheld and used moneys he had collected. The injury the State suffers from the failure to receive the moneys it has the right to receive at an appointed time, is the same, whether it results from the collector’s want of fidelity in paying over moneys he has actually received, or his want of diligence in collecting. For the injury, the State in either case has a clear legal right to compensation, and interest is the measure of the compensation.

Whether on the final settlement with the auditor made after the institution of this suit, and after the time appointed by law for its making, he exacted, or waived the payment of interest, is unimportant. The law fixes the measure of the liability of the appellees, and from that liability they can not be discharged by the *laches*, by the waiver, or by the express agreement of any public officer. The duties of the auditor are as carefully prescribed by the statute as are the duties of the tax collector; and within these duties is not comprehended that of waiving or contracting away the rights of the State, or of compounding with its debtors, though he is charged with the duty of making



[Crump v. Crump.]

settlements with, and holding some officials to accountability. The rulings of the Circuit Court were inconsistent with these views and its judgment is reversed and the cause remanded.

## Crump v. Crump.

### *Bill in Equity to Enforce Vendor's Lien.*

1. *Exceptions to master's report.*—Where a party excepting to the register's report fails to comply with the 93d Rule of Chancery Practice, requiring the noting of evidence at the foot of each exception to conclusions of fact drawn by the register, the chancellor commits no error in overruling the exception entirely.

APPEAL from Etowah Chancery Court.

Heard before Hon. H. C. SPEAKE.

This was a bill by the appellee, against the appellant, to enforce a vendor's lien on certain lands for unpaid balance of purchase-money. On the hearing, a decree was rendered granting relief, and ordering a reference to the register to ascertain and report the balance due on such purchase-money. To the register's report the appellant filed numerous exceptions relating to conclusions of fact drawn by the register, but he failed to note the evidence, or parts of evidence, relied on by him at the foot of each exception, as required by the 93d Rule of Chancery Practice. The chancellor overruled his exceptions, and this ruling is here assigned as error.

J. L. CUNNINGHAM, for appellant.

DUNLAP & DORTCH, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The exceptions taken to the report of the register, in this case, are not in accordance with the requirement of the 93d Rule of Chancery Practice. This Rule exacts of the party filing such exceptions, that he should note at the foot of each exception to conclusions of fact, drawn by the register, the evidence, or parts of evidence, upon which he relies in support of the several exceptions, with such designations and marks of reference, as to direct the attention of the court to the same. Where an appellant has failed to comply with this

[Ramsey v. Young.]

requirement, there is no error in the decree of a chancellor overruling his exceptions entirely.—*Mooney v. Walter*, ante p. 75.

Affirmed.

## Ramsey v. Young.

### *Action on Promissory Note.*

1. *Evidence ; admissibility of.*—In a suit at law on a promissory note, in which the consideration is stated, it is admissible to show by parol evidence a valuable consideration for the note, differing from that expressed therein.

#### APPEAL from Pike Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action of *assumpsit* brought by the appellee against the appellant, and was founded on a crop-lien note given under the statute for advances, in which the consideration is stated to be “necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements and money to procure the same,” etc. The appellant pleaded in short, by consent, (1) the general issue, (2) no consideration, and (3) failure of consideration. On the trial, the appellee having read in evidence the note sued on, the appellant was examined as a witness on his own behalf, and testified, that he did not, at the time the note was executed or at any other time, “buy or receive from the plaintiff or his agent, in whole or in part, any necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements and money to procure the same,” for the purpose of making a crop. Thereupon the appellee asked the witness, whether he did not buy, from appellee’s agent a lot of guano, to which the appellant objected, and offered to prove that guano was not one of the articles specified and named in the note as the consideration thereof. The court overruled the objection and allowed the appellee to show that a purchase by the appellant from an agent of the appellee, of a lot of guano, was the true consideration of the note; and the appellant excepted. This being substantially all the evidence, the court charged the jury, at the appellee’s request, that if they believed the evidence they must find for him, and the appellant excepted. The appellee obtained a verdict and judgment, and from the judgment this appeal was taken. The rulings of the lower court above noted are here assigned as error.

[Ramsey v. Young.]

M. N. CARLISLE, for appellant.

GRIFFIN & WOOD, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The record presents a single question—the admissibility of parol evidence to show a valuable consideration for a promise in writing to pay money, differing from that expressed in the writing. It is very well settled, that the consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary, or contradict writings, to receive parol evidence of the actual consideration for the purpose of determining its validity, or its failure, or that from any cause it is sufficient or insufficient to support the contract. 1 Green. Ev. § 285; 2 Whart. Ev. § 1042; 1 Brick. Dig. p. 862, § 828. In reference to bills of exchange and promissory notes, it is said in 1 Parsons on Notes and Bills, 194, “that any statement in a bill or note respecting the consideration may be explained or contradicted by parol evidence. It may be shown, notwithstanding any such statement, either that there was no consideration at all, or that the consideration was different from that stated.”

As a promise for the payment of money, the sale of guano was a consideration which would support the writing, equally with that which is expressed. The legal effect of the contract, as such promise, is not altered or varied, whether the one or the other is the real consideration. If it was sought to enforce the contract as a statutory lien for advances to make crops, a different question would be presented. Then disproving the consideration expressed, would disprove the existence of the lien; and evidence of any other consideration would be inadmissible for the reason, that however valuable such consideration may be, from it the lien can not be derived. The enforcement of the contract as a promise to pay money being the single purpose of the suit, it was permissible for the plaintiff by parol to show any valuable consideration for the promise, though it differed from that expressed in the writing.

Affirmed.



[Spicer v. The State.]

## Spicer v. The State.

### *Indictment for Murder.*

1. *When service of copy of indictment and venire on prisoner presumed.* Where the record in a capital case fails to show, that the prisoner, who was in actual confinement, was served with a copy of the indictment and of a list of the jurors summoned for his trial, as required by the statute, but does not show the contrary, such service will be presumed to have been regularly made, in the absence of any objection by the defendant in the lower court.

2. *Failure of record to show that special venire was summoned; whether it will be presumed that sheriff discharged his duty, quere.*—Where, in a capital case, the record shows that the court made the proper order for a special venire, but fails to show that the order was executed by the sheriff, being silent on that point, and it further shows that the defendant went to trial, without objection, before a jury organized from the regular panels summoned for the week, *it may be*, that, in such case, it will be presumed, on appeal, that the sheriff discharged his duty by executing the order, or that the defendant waived his right to have a compliance therewith; but this question is not decided in this case.

3. *Mandatory requirements of the statute; when must be complied with by the court in capital case.*—It is a reasonable and sound principle that, where, on the trial of a capital case, the statute peremptorily requires some order to be made by the court, which is of prime importance to the prisoner in securing to him the constitutional guaranty, that the “rights of trial by jury shall remain inviolate,” the action of the court in that regard becomes an essential part of the record, and, on appeal, it must affirmatively appear that the requirement was complied with.

4. *Record must affirmatively show in capital case an order appointing day for trial.*—Under the provisions of the statutes of this State, the court is required to appoint a day for the trial of a prisoner indicted for a capital offense; and this requirement being mandatory, and being also an act judicial in its nature to be performed by the court, and not a duty to be discharged by a ministerial officer acting under a judicial order, the record, on appeal, must affirmatively show that it was complied with. This court will not presume from the silence of the record, that the order was made, or that the right of the prisoner thereto was waived by his proceeding to trial without objection.

5. *Admissibility of confessions.*—A confession which is affirmatively shown to have been made voluntarily, though made while the defendant was under arrest, and in response to questions propounded by the officer having him in custody, is admissible evidence.

6. *Criminative facts discovered by examination of prisoner's person; when admissible.*—The submission by a female defendant of her person to a private examination by physicians, is not a confession, although the result of the examination was a disclosure of facts of a criminative character; and such facts are competent evidence against her, although she was induced to submit to the examination through the assurance, that, “it would be the best thing for her that she could do.”

APPEAL from Coffee Circuit Court.

Tried before Hon. H. D. CLAYTON.

[Spicer v. The State.]

At the Fall Term, 1880, of the Circuit Court of Covington County, Ann Spicer, the appellant, and another were jointly indicted for the murder of her infant child, and on their application for a change of venue, the case was removed to the Circuit Court of Coffee County, where the defendants were tried, and the appellant was convicted of murder in the first degree, and sentenced to the penitentiary for life. On the trial, as appears from the bill of exceptions, it was shown on behalf of the State by the testimony of one Straughn, that after the appellant was arrested, she was placed in his custody temporarily by the constable arresting her; and that thereupon, at the request of witness appellant took a seat near him, when witness said to her that "she had as well tell where the child was; that she knew she was not then as she was two weeks before; that she had as well tell where the child was, for they would dig up the ground a mile square and six feet deep, or they would find the child;" but that witness "never stated to the defendant, that it would be better for her to tell it, or worse for her if she did not tell it, nor did he use any other inducement to get the defendant to make any confession. The State then offered to prove by said witness what the defendant said to him at that time about having been delivered of a child, and what she did with it." The appellant objected to the admission of the confession in evidence on the ground that it was not voluntarily made; and thereupon the court allowed the defendant to show by one Smith, that about half an hour before her arrest, which was but a short time prior to the foregoing conversation between appellant and Straughn, he and two others were appointed by the citizens as a committee to have her examined, to see whether or not she had been delivered of a child; that thereupon they and two physicians went to her residence and called her out to the gate, when witness said to her, that it was the opinion of the citizens generally, that she had been delivered of a child and that she had destroyed it, and that they had been appointed as a committee to have her examined by the physicians; that she at first refused to be examined by the physicians, but offered to submit to an examination by an old colored midwife who was "near by;" that witness then told her that "it would be the best thing for her that she could do, to go and submit to the examination" by the physicians; that she then agreed to be examined by the physicians, and immediately thereafter was examined by them. It was also shown that the appellant was a negro woman of only ordinary intelligence for a negro. The appellant then renewed her objection to the admission in evidence of any confession made by her to the witness Straughn, but the court overruled her objection, and allowed the State to introduce the confession in evidence, and the appellant excepted.

[Spicer v. The State.]

This confession was, in substance, that she had been delivered of a child, and that she had administered laudanum to it, because it was in misery, and she desired to end its misery; and that she had buried it down in the woods, at the same time pointing in the direction of certain woods where the child was afterwards found buried.

The other facts are stated in the opinion.

W. D. ROBERTS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The record in this case is exceedingly defective, especially in view of the fact that the prisoner was under indictment for a capital offense.

It fails to show, in the first place, that there was any service on the prisoner of a copy of the indictment and of the list of the *venire* summoned for her trial, such as is required by statute to be made upon defendants in actual confinement under an indictment for any capital offense. The record, however, being entirely silent in this particular and failing to show the contrary, the principle has been settled by this court, that, in the absence of any objection by the defendant, such service will be presumed to have been regularly made. It was so ruled in the case of *Paris v. The State*, 36 Ala. 232, and again in *Rush v. The State*, 61 Ala. 90. The contrary doctrine announced in *Robertson v. The State*, 43 Ala. 325, that to sustain a conviction in a capital case, the record must affirmatively show a compliance with this requisition of the statute, has been in effect, and is now expressly overruled on this point.

The record, furthermore, fails to show that the sheriff summoned a special *venire* of fifty persons from whom to organize a jury, as ordered to be done by the court.—Code, § 4874. The order for this purpose seems to have been properly made by the presiding judge, but the record is silent as to whether or not it was executed by the sheriff. As the defendant went to trial without objection, and a jury was organized from the regular panels summoned for the week, it may be that, in view of both the silence of the record and that of the defendant, the officer may be presumed to have faithfully discharged his duty in this regard, or that the defendant waived her statutory right conferred by law and preserved for the exercise of her option by the order of the court. This point, however, we do not expressly decide, as the judgment of the Circuit Court must be reversed on another ground. We content ourselves



[Spicer v. The State.]

with the citation of the following authorities bearing on the question; *Bell v. The State*, 59 Ala. 55; *Paris v. The State*, *supra*; *Rash v. The State*, *supra*; 1 Bish. Cr. Law, § 996; *Roberts v. The State*, 68 Ala. 515.

There is a fatal defect in the record, however, in its failure to affirmatively show that the court *appointed a day for the trial of the prisoner*. This is a valuable safeguard conferred on defendants charged with capital crimes, and is imperatively necessary under the mandatory provisions of the statute. The Code provides that "if the defendant is indicted for a *capital offense*, and is in actual confinement, a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, must be delivered to him at least *one entire day before the day appointed for his trial*."—§ 4872. And "if he is not in actual custody, and has counsel, whose names are so entered on the docket, such counsel must, on application, be furnished with a copy of the indictment and a list of the jurors."—*Ib.* And the service in this latter case must also, as held in *Bain v. The State*, at the present term, be one entire day before the day set for trial. It is most obvious that the statute requires, in accordance with the long established and uniformly existing practice, that a day shall be fixed for the trial of every capital case, and that the order required to be made for a special *venire* shall be returnable to this day.—Code, § 4874. These provisions, like the one requiring the service of a copy of the indictment and a list of the special *venire* one entire day before the appointed day of trial, are mandatory and not directory merely.—*Nutt v. The State*, 63 Ala. 180; *Roberts v. The State*, 68 Ala. 515.

We are of opinion that this is an essential part of the record in every capital case. It is an act of the court, judicial in its nature, and expressly required by statute, and not the duty of a ministerial officer acting merely under the authority of a judicial order. We can not safely assume that it was done unless it is affirmatively shown by the minute entries of the court. A presumption of its truth, in view of the silence of the record, is not authorized, in our opinion, by any decision heretofore made by this court.—Clark's Man. Cr. Law, § 2588. True it was held in *Paris'* case, 36 Ala. 232, that in the absence of all objection by the defendant, a judgment of conviction will not be reversed because the record does not affirmatively show a formal arraignment of the prisoner, and the service on him of a copy of the indictment and a list of the *venire*. But the last omission was the act of a ministerial officer, and the first related to a preliminary proceeding which could be waived by pleading to the indictment.—*Fernandez v. The State*, 7 Ala. 511; 1 Bish. Cr. Proc. § 733. And while it was held in the case of

[Spicer v. The State.]

*Aaron v. The State*, 39 Ala. 684, by a divided court, and again in *Taylor v. The State*, 42 Ala. 529, that in ordinary cases of felony, the record need not affirmatively show that the prisoner was asked by the court, before sentence was pronounced against him, if he had anything to say in arrest of judgment, yet neither of these were capital cases, and in *Perry v. The State*, 43 Ala. 21, which was a *capital* case, the opposite conclusion was reached, and is probably supported by the weight of authority.—1 Bish. Cr. Proc. § 1118.

We take the principle then to be reasonable and sound, that where, at least in every trial for a capital offense, the statute peremptorily requires some order to be made by the court, which is of prime importance to a prisoner in securing to him the constitutional guaranty that the "right of trial by jury shall remain inviolate," the action of the court in this regard becomes an essential part of the record and must affirmatively appear to have been performed. "The forms of records are deeply seated in the foundations of the law, and as they conduce to safety and certainty, they ought not to be disregarded, when the life of a human being is in question."—Per GIBSON, C. J., in *Hamilton v. Commonwealth*, 4 Harris, 129; *Aaron's case*, *supra*, dissenting opinion of Justice JUDGE, 39 Ala. 687.

The order fixing a day for the trial of the defendant being an essential part of the record, we do not think that this is a case where the fact of the prisoner's having proceeded to trial without objection would constitute such a *waiver* of her rights as to debar her in the appellate court. Unless the proper order had been made, no fair field for the exercise of an untrammelled option could be presented. We can not judicially know that a trial was not the sole alternative to continued incarceration.—1 Bish. Cr. Proc., §§ 117, 125, 995, *et seq.*; *Nomaque v. People*, 12 Amer. Dec. 157; *Moss v. State*, 42 Ala. 546; *State v. Hughes*, 1 Ala. 635; Cooley's Const. Lim. (4th Ed.), 394–5, [319–20]; *Sanders v. State*, 55 Ala. 42.

There is nothing in the objections urged to the testimony of the witness Straughn as to the confessions of the defendant. They are affirmatively shown not to have been elicited through the influence of either threats or promises, or other improper appliances, and were therefore voluntary.—Clark's Cr. Dig. § 328; Whart. Cr. Ev. § 646; 1 Greenl. Ev. § 219.

Nor was it material, in the absence of all evidence tending to show that the confessions were involuntary, that they were made while the defendant was under legal arrest, and in response to questions propounded by the officer having her in custody. *Meinaka v. The State*, 55 Ala. 47; Whart. Cr. Ev. § 649; *Aaron v. The State*, 37 Ala. 106.

It is true that the defendant was induced to submit to a pri-

[Ex parte Holton.]

vate examination of her person by physicians, through the assurance that "it would be the best thing for her that she could do." But this act was not a confession, although the *result* of it was to disclose facts of a criminative character. Even in cases where confessions, by word or act, are extorted illegally, the *facts developed*, which go to prove the existence of the crime of which the defendant stands charged, will be received as competent evidence.—Whart. Cr. Ev. § 678; *Sampson v. State*, 54 Ala. 241; 1 Greenl. Ev. § 232.

For the above defect in the record, the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial. In the meanwhile, the defendant will be retained in custody until discharged by due course of law.

### *Ex parte Holton.*

#### *Application for Mandamus to Compel Judge of the Circuit Court to Strike Cause from the Docket.*

1. *Discontinuance; what operates as.* In this State, on the commencement of a common law action, it is the duty of the clerk to place it on the docket, and afterwards to continue it there from time to time, until it is disposed of by some order of the court; and his mere failure to continue the cause on the docket, unless caused by some positive act of the plaintiff, or by his omission to perform some precedent duty enjoined on him by law, does not work a discontinuance. But, if the cause is kept off the docket by the act of the plaintiff, or by his failure to perform a duty preliminary to the right to have it placed on the docket, this will amount to a discontinuance.

2. *Change of venue; prepayment of costs by party applying for.*—It is the duty of a party obtaining a change of venue, under the statute (Code of 1876, § 3119), to prepay the fees prescribed by the statute for a messenger to transport the transcript and papers in the cause to the court to which the same is removed without any demand therefor; and the clerk is not required to transmit the transcript and papers without the prepayment of such fees.

3. *Same; effect of.*—The effect of a change of venue regularly granted, is the discontinuance of the suit in the court in which it was brought; and thereupon the cause passes out of the jurisdiction, and off the docket of that court; and unless it is transferred to the court to which the change was made and docketed there, it ceases to have a place in any court.

4. *Discontinuance; what amounts to.*—A plaintiff in an action of forcible entry and detainer pending in the circuit court, obtained a change of venue, but neglected for about seven years to prepay the messenger's fees to transport the papers in the cause to the court to which the change was made, or to tender the same, and by reason of such neglect, the papers did not reach the latter court until about seven years after the order for the change of venue was entered, and during that time the cause remained off the docket; *held*, that this wrought a discontinuance of the cause; and this court, on defendants' petition, awarded a *mandamus* com-



[Ex parte Holton.]

PELLING the circuit judge to strike the cause from the docket, he having refused to do so on motion made by defendants.

5. *Same; when party not estopped from claiming.*—In such case, the defendants are not estopped from claiming a discontinuance, by the fact that a third party, under whom they held, as tenants, had obtained an injunction restraining the plaintiff from a further prosecution of the suit.

Application to this court for a writ of *mandamus*, to compel Hon. LEROY F. BOX, judge of the seventh judicial circuit, presiding at Etowah Circuit Court, to strike from the docket of said court, a cause thereon.

In 1869, M. J. Turnley commenced an action of forcible entry and detainer against W. H. Holton and others, the relators, before a justice of the peace in De Kalb county, and soon thereafter obtained a judgment, from which the relators appealed to the Circuit Court of said county. At the Fall Term, 1873, on the plaintiff's motion, a change of venue was granted to Etowah county, and the clerk was ordered to transmit the proper transcript and the original papers in the cause to the clerk of the Circuit Court of that county. About two months prior to the Fall Term, 1881, of the Etowah Court, Turnley filed the transcript and papers in that court, having prior to that time failed to do so; and at that term the relators moved the court to strike the cause from the docket on the ground, in substance, that by and through the default and neglect of the plaintiff in causing said transcript and papers to be filed in said court, the cause had been discontinued. On the trial of this motion it was shown that immediately after the adjournment of the Fall Term, 1873, of the De Kalb Circuit Court, the clerk thereof made out a transcript of the orders and proceedings in said cause as required by the statute, and that the same and the original papers were by him duly certified to the clerk of the Etowah Circuit Court, preparatory to being transmitted to the latter; but that the plaintiff did not prepay or offer to prepay the fees for the messenger, as provided by section 3119 of the Code of 1876, until some time in the summer of 1881, and that said clerk did not transmit said transcript and papers at an earlier date because such fees were not prepaid. Evidence was also introduced tending to show that, in September, 1873, the plaintiff was notified that the transcript and papers were ready for transmission, and would be transmitted on prepayment of the fees prescribed by the statute for the messenger, and that he refused to make such prepayment; but on this point the evidence was conflicting. The plaintiff introduced evidence showing that one Alexander B. Hanna, who seems to be the real party in interest, and under whom the relators were tenants, and as such tenants in possession of the lands in controversy, on the 4th day of Novem-

[Ex parte Holton.]

ber, 1873, filed his bill of complaint in the Chancery Court of De Kalb county, against Turnley and others, for the purpose of enjoining the further prosecution of said action of forcible entry and detainer, and other actions at law, in which the change of venue to Etowah county was averred; and that on the same day a writ of injunction was issued in accordance with the prayer of the bill.

The Circuit Court overruled relators' motion and refused to strike the cause from the docket, to which ruling they excepted; and thereupon they applied to this court for a writ of *mandamus* to compel the presiding judge of said court to strike said cause from the docket.

RICE & WILEY, for the relators.—(1). The effect of the order for the change of venue was instantly to put an end to all jurisdiction of the De Kalb Circuit Court, and to vest the exclusive jurisdiction of the case in the Etowah Circuit Court. Hence, when the plaintiff procured that order, *he made* "a gap or chasm" in the proceedings and created cause for discontinuance of the action, if *he* kept the cause off the docket, or caused it to be kept off the docket of Etowah Circuit Court during the entire term of that court next succeeding the making of the order, and neither moved for nor procured, during that term, any order from that court to have the case placed on its docket. *Carleton v. Goodwin*, 41 Ala. 154. (2). It was the duty of Turnley to prepay the messenger's fees.—Code of 1876, § 3119. His failure to do so was cause for the discontinuance of the action. He was not prevented from so doing by the issuance of the injunction, because it was not issued until after the adjournment of the Etowah Circuit Court next after the order of removal. (3). The injunction did not prevent Turnley from paying the mileage after its issuance, nor from putting the cause on the docket of the Etowah Circuit Court, and then having it continued under the injunction.

WATTS & SONS, DUNLAP & DORTCH and AIKEN & MARTIN, *contra*.—(1). In order to work a discontinuance, there must be some *act* or neglect of the plaintiff, *inconsistent* with an *intent* to prosecute his case, when he is left free to act. See *Glenn v. Billingslea*, 64 Ala. 345; *Ex parte Remson*, 31 Ala. 270; *Brown v. Clements*, 24 Ala. 354; *Forrester v. Forrester*, 39 Ala. 320. (2). No *laches* can be imputed to the plaintiff before the Spring Term, 1874, of the Etowah Court, as the clerk of the De Kalb Court had until that time within which to transmit the transcript and papers. And before that time the plaintiff had been *enjoined* from doing any thing in the case, and he could not then prosecute the case until the dissolution of the in-

[Ex parte Holton.]

junction. If the cause had been docketed, no action could have been taken, except a "*continuance under injunction*," without a breach of the injunction. Under these circumstances, can it be properly said, that there has been any discontinuance? (3). Section 3119 of the Code of 1876 does not seem to require the costs of the messenger to be paid, except on the demand of the clerk. The last clause shows that if such costs are paid by the opposing party, they are to be taxed in the bill of costs against the adversary. No demand was made on the plaintiff. (4). The procuring of the injunction restraining the plaintiff from prosecuting the suit in *Etowah* was an *act* recognizing the case as being *properly* in that court, done by Hanna, the real party in interest; and neither he nor the relators, who hold under him, can *afterwards* be heard to say that the case was *not* properly in that court. (5). In *Harrell v. The State*, 26 Ala. 52, it was held, that the failure to file the transcript for two terms after the change of venue was ordered, did not work a discontinuance of the cause. There can be no substantial reason for a different rule in a civil case.

STONE, J.—When a change of venue is obtained in a civil cause, the statute, Code of 1876, § 3119, declares that "the clerk or messenger is entitled to five cents per mile, and tolls and ferriages, going and returning, which must be paid in advance by the party applying for the change of venue." The plain import of this statute is, that the clerk shall not be required to transmit the transcript and original papers, for which § 3118 makes provision, unless such prepayment of fees for the messenger be first made. The section of the Code above copied has a further provision, as follows; "If paid [the messenger's fees] by the opposing party, to be taxed in the bill of costs against his adversary." Under this clause it is contended that the party applying for the change of venue was not required to make this prepayment, until demand was made upon him therefor. We think it had a different purpose. When a change of venue is regularly granted, the effect is to discontinue the suit in the court in which it was brought. It passes out of the jurisdiction, and off the docket of that court. If not transferred to the other court, and docketed there, it ceases to have a place in any court. Now, cases may arise, in which the party obtaining the change of venue may have no wish to have the cause appear on any docket. He takes it out of the jurisdiction of one court, by obtaining the order for a change of venue. He may have no wish to place it within the jurisdiction of another court. Better for him, possibly, that the suit abate, and cease to exist in any court. This was doubtless the reason, why the legislature inserted the last clause in section 3119 of the



[Ex parte Holton.]

Code. It was to enable the party against whom the change of venue was obtained, to secure a transmission of the papers and transcript, when his adversary failed to do so, and, at the same time, secure it as a proper charge against the party who applied for and obtained the change of venue. We hold it was the duty of the party obtaining the change of venue to prepay the fees of a messenger to transport the papers, and this without any demand therefor. Neglecting to do so, and the papers not reaching their proper destination in consequence thereof, does this work a discontinuance of the cause? The case remained off the docket about seven years.

In 1 Tidd's Prac. 678, it is said: "The process or proceeding in a suit should be regularly continued from term to term, or from one day to another in the same term, between the commencement of the suit and final judgment; and if there be any lapse or want of continuance that is not aided, the parties are out of court, and the plaintiff must begin *de novo*." In 3 Black. Com. 296, the language is: "When a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend." We have not followed these extreme rules of the common law. With us, a common law action being commenced in court, it is the duty of the clerk to place it on the docket, and continue it there from term to term, until it is disposed of by some order of the court. His mere failure to continue the cause on the docket, unless such failure is caused by some positive act of the plaintiff, or by his omission to perform some precedent duty enjoined on him by law, does not work a discontinuance. On the other hand, if the cause is kept off the docket by the act of the plaintiff, or by his failure to perform a duty preliminary to the right to have it placed on the docket, this will amount to a discontinuance.—*Drinkard v. The State*, 20 Ala. 9; *Griffin v. Osbourne*, *Ib.* 594; *Harrall v. The State*, 26 Ala. 52; *Ex parte Remson*, 31 Ala. 270; *Forrester v. Forrester*, 39 Ala. 320; *Ex parte Rivers*, 40 Ala. 712; *Glenn v. Billingslea*, 64 Ala. 345; *McGuire v. Hay*, 6 Humph. 419; *Peirce v. Bank of Tenn.* 1 Swan, 265; *Moreland v. Pelham*, 2 Eng. (Ark.) 338; *Gilbert v. Hardwick*, 11 Ga. 599.

It is contended, that inasmuch as Hanna, who was the real party in interest, soon after the order was obtained for the change of venue to Etowah county, but after the next term of the Circuit Court of that county, filed a bill, alleging that the case was pending in Etowah county, and obtained an injunction, restraining the plaintiff from further prosecuting that suit, this precludes the present relators, who are the mere tenants under Hanna, from claiming a discontinuance of this cause, on the

[Ex parte Holton.]

ground alleged. This argument rests on two grounds: *first*, that by averring the cause was pending in Etowah court, Hanna must be held to the admission that it was pending there; and *second*, that by enjoining the prosecution of the suit at law, he not only authorized, but required the plaintiff to abstain from any steps to bring about a trial of that cause. When the bill was filed—about one month after the order for change of venue was granted—the suit at law had ceased to be a suit pending in De Kalb county. If it was pending anywhere, it was in Etowah county. The one court immediately succeeded the other, and it could not be contended that a failure of the De Kalb clerk to forward the papers and transcript to that term of the Etowah Court, was such an omission of duty by the plaintiff as to work a discontinuance. Only one day intervened between the courts, and that a Sabbath. Technically, the cause was pending in the Etowah Circuit Court. This averment in Hanna's bill would not estop him from claiming the discontinuance, if he had been the defendant of record in that cause. The injunction obtained, restrained the plaintiff from prosecuting the suit at law. If steps had been taken to bring on a trial, or to prepare for it, this would probably have been a violation of the injunction. Docketing the cause, and having it, by order of the court, continued under the injunction, could not be construed as a disregard or contempt of the order of the court. It would have been simply a mode of preserving the vitality of the cause, and is the customary method in such cases. It could do the complainant in the injunction suit no harm.—*Parker v. Wakeman*, 10 Paige, 485; *Hudson v. Plets*, 11 Paige, 180; *Clark v. Wood*, 11 Halst. 458; High on Inj. § 856. By the the plaintiff's omission to prepay the fees of the messenger, the case was kept off the docket of the Etowah Circuit Court for seven years; and during that time there was no authority for placing it on any other docket. This worked a discontinuance.

There is in the record in this cause a written consent, signed by the presiding judge of Etowah Circuit Court, waiving the issue of a rule *nisi*, and consenting that if this court reach the conclusion that the relators are entitled to relief, a peremptory writ of *mandamus* may at once issue. It is therefore ordered and adjudged that the writ of *mandamus* issue to the judge presiding in the Etowah Circuit Court, directing and commanding him to stike from the docket of said court the cause described in the relation and proceedings in this cause, unless upon being certified of this judgment he make such order without further mandatory direction of this court.

[Yarbrough &amp; Co. v. Bush &amp; Co.]

No costs awarded in this cause.—*Ex parte Garland*, 42 Ala. 559.

BRICKELL, C. J., not sitting.

## Yarbrough & Co. v. Bush & Co.

### *Attachment against Partnership.*

1. *Action against partnership by its firm name; effect of judgment.* When action is commenced under the statute (Code of 1876, § 2904), against a partnership by its firm name, without naming the individual partners, and a judgment is rendered against the firm as such, an execution issued on such judgment can only be levied on the partnership property. The action is, therefore, somewhat in the nature of a proceeding *in rem* rather than *in personam*.

2. *Same; plea of coverture no defense.*—While a married woman can not incur any personal liability by contract, and her coverture is a defense to any action brought to enforce against her a personal liability growing out of a contract made while she is under that disability; yet a plea of coverture is no defense to an action brought under the statute against a partnership by its firm name, of which she was in fact a member, as the effect of such action is not to enforce a personal liability, or to obtain a personal judgment against her.

APPEAL from Geneva Circuit Court.

Tried before Hon. H. D. CLAYTON.

This suit was commenced by attachment against C. S. Yarbrough & Co., a partnership, by its firm name, without stating in the affidavit, bond, writ or complaint the names of the individuals composing the firm. The attachment was levied on a stock of goods, wares and merchandise "of the said firm of C. S. Yarbrough & Co." The record fails to disclose on whom the notice of the attachment was served; and the only appearance was by Julia A. Flemming, a married woman, who pleaded that at the time of making the contract sued on (which was for goods, wares and merchandise sold by the appellees to the appellants), she was a married woman, "and had been continuously up to the present time, and is now a married woman." This plea, on the motion of the appellees, was stricken from the file, and the cause was then tried on the general issue, and resulted in a jury and verdict for the appellees.

The ruling of the Circuit Court on the plea of coverture is here assigned as error by the appellants, and also separately by Mrs. Flemming.



[Yarbrough &amp; Co. v. Bush &amp; Co.]

W. D. ROBERTS, for appellants. (No brief came to the hands of the reporter.)

W. E. BROWN, and C. H. LANEY, *contra*.—The court did not err in striking from the file the plea of coverture, because the suit is against the *firm* of C. S. Yarbrough & Co., and the attachment was levied on partnership property. The judgment is not against Mrs. Flemming individually, but against the firm; and, therefore, the firm's property only is liable for its satisfaction.—Code of 1876, § 2904, and authorities cited in note.

SOMERVILLE, J.—It is provided by section 2904 of the present Code, 1876, that *partners*, associated together in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, “may be sued by *their common name*, and the summons in such case being served on one or more of the associates, the judgment in the action *binds the joint property of all the associates*, in the same manner as if all had been named as defendants, had been sued upon their joint liability, and served with process.”

The present suit was brought under this section, by the appellees against the appellants, under their common or firm designation of “C. S. Yarbrough & Co.” A married woman, one Mrs. Julia Flemming, constitutes one of the members of this partnership, who are thus sued as defendants. The question presented is, whether she can set up her coverture by plea in defense of the action. Our judgment is very clearly that she can not.

When an action is instituted, under the provisions of this statute, against a partnership by its firm name, without naming the individual partners who comprise it, and a judgment is rendered against the firm as such, an execution issued on the judgment can only be levied on the partnership property. It will not bind the property of the several individual partners. The action is, therefore, somewhat in the nature of a proceeding *in rem* rather than *in personam*.—*Haralson v. Campbell*, 63 Ala. 278; *Moore v. Burns*, 60 Ala. 269; *McCoy v. Watson*, 51 Ala. 466; *Wyman, Moses & Co. v. Stewart*, 42 Ala. 163.

It is true that a married woman has no power of entering into any kind of contract on her own behalf, so as to incur any personal legal liability. Being under legal disability, her contracts are void, except so far as authorized by statute, and the plea of coverture is fatal to any action on them brought with the view of enforcing a *personal liability* against her. But there is no effort here to hold Mrs. Flemming to a personal liability, or to obtain a personal judgment against her. The judgment authorized by the statute is one against the partnership,

[Tuttle v. Walker.]

and it can bind only the partnership property. The plea of coverture was no defense to the action, and the Circuit Court did not err in ordering it to be stricken from the file.

Let the judgment be affirmed.

## Tuttle v. Walker.

*Assumpsit.*

1. *Error in charging upon effect of the testimony ; when not shown.* Where the bill of exceptions does not purport to state all the evidence which was introduced on the trial, this court can not affirm that the lower court erred in refusing a general charge upon the effect of the testimony, requested by one of the parties.

3. *Charge upon effect of the testimony ; when properly refused.*—A general charge upon the effect of the testimony can be given with propriety, only when the evidence, as to all material facts, is free from conflict.

3. *Landlord's lien on crop ; what is not a waiver.*—It can not be affirmed as a general rule, that the mere consent of the landlord to a removal of the crop from the rented premises, is a waiver of his lien, as much must depend on the purposes of the removal and the purposes for which the consent was given. A charge affirming such a general proposition, is too broad, and should be refused.

APPEAL from Macon Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action of *assumpsit* for money had and received ; was brought by J. W. and B. W. Walker, the appellees, against A. G. Tuttle, the appellant ; was commenced before a justice of the peace on the 10th of January, 1881, and was taken by appeal from the judgment of the justice, to the Circuit Court, where the cause was tried *de novo*. Testimony was introduced on the trial tending to show, that the appellees rented land to one Henry Walton, for the year 1880, for a stipulated rent, and had also advanced to him during that year ; that Henry Walton had made a crop of cotton on the rented lands, and he had not fully paid the amount of his rent and advances ; that in November, 1880, the appellant purchased from one Doc Walton, a son of Henry Walton, one bale of cotton and paid him therefor ; that afterwards the appellees notified him that they had a lien on the cotton, and thereupon he obtained from Doc Walton \$35.50 of the money paid him for the cotton, which, however, the appellant afterwards, on advice of his attorney, paid back to Doc Walton ; that the cotton was raised on the rented premises, from which it was removed with the knowledge and consent of the appellees, for the purpose of selling it, and that this purpose was also known to them ; but on this point, as well as

[Tuttle v. Walker.]

on several other material points in the case, the evidence was conflicting.

The defendant in the court below asked the following charges: 1. "That if the jury believe all the evidence they must find for the defendant;" and 2, "that the plaintiffs can not recover in this form of action on the case established by the plaintiffs' evidence." The record does not show that these charges were asked in writing. The defendant also asked the court in writing to give a third charge in these words: "If the plaintiffs consented to the removal of the cotton from their place, or knowing that it was removed and did not object, they waived their lien." The court refused to give all three of the charges asked by the defendant, and he separately excepted. There was a judgment for the plaintiffs, from which this appeal was taken; and the errors assigned are the rulings of the court above noted.

WADDY THOMPSON, for appellant.

W. C. BREWER, and W. C. McIVER, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The single assignment of error is, that the Circuit Court erred in refusing three several instructions to the jury, requested by the appellant. The first was a general instruction, that if the jury believed the evidence they must find for the appellant. The bill of exceptions does not purport to state all the evidence which was introduced on the trial, and in the absence of such statement, it is obvious this court can not affirm there was error in the refusal of this instruction. And the evidence, so far as stated, is conflicting as to material facts. With propriety, instructions of this character can be given only when the evidence as to all material facts is free from conflict.—1 Brick. Dig, 335, § 3, subd. 2.

The second instruction was not in writing, and for this reason was properly refused.—*Hollingsworth v. Chapman*, 54 Ala. 7.

The former statute (R. C., §§ 2961–62,) limited the right of a landlord to an attachment, to enforce the lien for rent on crops grown on rented premises to two cases: first, where without paying the rent the tenant was about removing the crop from the premises; second, where without paying the rent the tenant removed the crop or any part thereof. The present statute materially enlarges the remedy, and the landlord can pursue it, when the rent becomes due and the tenant on demand fails to pay it, though the tenant has not removed or contem-



[McCarty v. Williams.]

plated the removal of the crop.—Code of 1876, §§ 467-73. The purpose of the present statute is to render the lien firmer, more stringent, and a more effectual security to the landlord for the payment of rent and for the payment of advances he may make the tenant. It can not be affirmed as a general rule, as is affirmed in the third instruction requested by the appellant, that the mere consent of the landlord to a removal of the crop from the rented premises, is a waiver of the lien. Much must depend upon the purposes for which the consent is given. If the landlord consents that the tenant should remove and sell the crops, a sale to a *bona fide* purchaser would operate a destruction of the lien. But if he consented to the removal, that the products should be better prepared for market, or more safely stored, than could be done on the rented premises, it would be unjust to infer that he waived, or intended to waive, the lien. Whenever a waiver of the lien is claimed from the consent of the landlord to the removal of the crop, all the attendant circumstances must be considered, and from them the inference drawn, whether there was an intention to waive the lien, or whether strangers dealing in good faith, upon the possession of the tenant separated from the possession of the rented premises, have been misled. As a general proposition, the third instruction is too broad, and was properly refused.

Affirmed.

## McCarty v. Williams.

### *Bill in Equity to enforce Vendor's Lien.*

1. *Vendor's lien; when not retained.*—At a sale made by an executor of the lands belonging to his testator's estate, for division, under a private act of the legislature, five of the legatees under the testator's will became jointly the purchasers of a part of the lands, at a price agreed on, payable part in cash, and balance in one and two years. They arranged the cash payment by giving the executor their several receipts in part payment of their respective legacies, and for the deferred payments they executed joint notes. Under the act the sale was reported to, and confirmed by the Chancery Court of Montgomery county. After the maturity of the notes, the purchasers having failed to pay the same, a compromise was made between the executor and all the legatees, by which their several shares under the will were fixed at \$3,000.00, and the purchasers receipted the executor in full for their several shares, and in addition thereto, agreed to pay him, each the sum of \$500.00 in settlement of their notes. Each of the purchasers paid the executor \$500.00 as agreed on, except one, a married woman; and the executor, relying on the promise of her husband, that the \$500.00 to be paid by her, would be shortly paid, reported to the court that all the purchase-money for the

[McCarty v. Williams.]

lands had been paid; and the court thereupon ordered him to execute a deed, conveying to the purchasers the lands purchased by them, which he did. Afterwards the five purchasers divided the lands purchased by them among themselves, each being allotted a part thereof. The \$500.00 not having been paid, and the executor having, on a settlement with the estate accounted for that sum, as assets thereof collected by him, filed a bill in his individual capacity, claiming a vendor's lien on the part of the lands allotted to the purchaser who owed him that sum for the payment thereof, and seeking to enforce the same. *Held*, that the facts of the case and the conduct of the complainant repel all implication, that a vendor's lien was retained by him for the payment of said sum.

APPEAL from Montgomery Chancery Court.

Heard before HON. JNO. A. FOSTER.

ARRINGTON &amp; GRAHAM, for appellant.

GUNTER & BLAKEY, *contra*.

STONE, J.—The present bill was filed to enforce a vendor's lien. The bill is rather peculiar in its frame and averments. Williams, the complainant, was executor of the will of Judkins, who left a considerable landed estate, and some twenty devisees or legatees. By private act of the legislature, approved December 19, 1871—Pamph. Acts 134-5—the executor was authorized to sell the lands to the highest bidder, “in order to facilitate a division and distribution of proceeds of sale.” The terms of sale were prescribed, “one-third cash, and the balance on a credit of one and two years in equal installments, with interest.” The executor was required to give notice of sale, for three weeks in a newspaper, and to “make a report in writing of said sale to the Chancery Court of Montgomery county, and such sale shall be confirmed or set aside by said court, as to it shall appear fair and just.” The bill avers, that pursuant to said statute, the executor sold a large tract of land belonging to said estate on the 22d day of January, 1872, and that Sallie McCarty, the female defendant in this cause, together with four other legatees under said will (she being one), became the joint purchasers, at the bid and price of some sixteen thousand six hundred and fifty dollars. The purchasers made the cash payment, by giving their several receipts to the executor for so much of their several legacies as represented their several proportions of the cash payment; and for the deferred payments they gave the executor their joint notes, payable in one and two years, with interest. Thereupon the executor reported the sale to the Chancery Court of Montgomery county, and it was confirmed.

The bill then avers, that these notes remained unpaid until April, 1876, during which time the lands had undergone a

[McCarty v. Williams.]

great shrinkage in their market value, and, as a security for the payment of the deferred installments, had become grossly insufficient. There was then an agreement and compromise between the executor and all the legatees, as follows: The several shares of the legatees under the will were agreed to be fixed at \$3,000. The purchasers of the lands were each to give the executor an additional receipt, so as to show, with the former receipt given, the sum of three thousand dollars received by each of the purchasers, in full of all interest in the estate. In addition to this, each purchaser agreed and promised to pay Williams, the executor, the sum of five hundred dollars; making the sum of twenty-five hundred dollars additional to be paid. These additional payments added to the sum of the receipts given—\$15,000—foot up \$17,500 as the compromise purchase price. Computing interest on the deferred installments, this was a saving to the purchasers of over two thousand dollars. This was carried out, and each of the purchasers, except Mrs. McCarty, paid the executor five hundred dollars. The bill then avers, "that Orator, relying on the promise of the said Fletcher McCarty, the husband of the said Sallie McCarty, that the said sum of five hundred dollars so to be paid by his wife on her said purchase would be settled to Orator's satisfaction in a short time, and this sum of five hundred dollars being the only part of the said joint purchase which had not been paid, reported to the said chancery court that the whole of said purchase-money had been paid by the said purchasers. Said report was made on the 24th day of July, 1876, and upon said report the said chancery court made an order, directing that deeds to the land purchased by them at said sale should be made to the purchasers thereof, or such other persons as they might direct. And thereupon Orator did execute a deed to said tract of land so purchased at said sale to the said Sallie McCarty and the other purchasers thereof." The bill avers, that Williams, the executor, has made a settlement of said estate, and accounted for said money as assets collected; but that Mrs. McCarty's part has never been paid to him. The bill then avers, that the five purchasers of said land had made a partition among themselves, and that a certain portion, described in the bill, fell to Mrs. McCarty in the partition. The bill claims the five hundred dollars as unpaid, with interest thereon from April 4th, 1876, and seeks to condemn to its payment the lands allotted to Mrs. McCarty in partition.

There are many reasons why the lien claimed in this case can neither be enforced nor recognized. There was a joint purchase by five persons of a large tract of land, and joint notes given for the purchase-money, in a sum exceeding eleven thousand dollars. These transactions took place in January, 1872.



[McCarty v. Williams.]

The vendor, Williams, retained the title, and clearly had a lien on the whole tract of land for the unpaid purchase-money. Four years afterwards, in 1876, the whole contract was changed, the purchase-money, except \$2500 was paid, or surrendered in compromise, and for that sum Williams accepted the individual promise of the several purchasers for their several proportions, Mrs. McCarty's part being five hundred dollars, drawing interest from that date, 1876. If there was any lien then, it was a lien on Mrs. McCarty's undivided fifth interest in the entire tract purchased. The executor went farther. Trusting in Mrs. McCarty's husband to pay, he reported the purchase-money paid, obtained an order to make title to the purchasers, and made them title. The purchasers became tenants in common, as the result of the transaction. They then had partition, and became tenants in severalty. The prayer of the bill is, that a lien be declared on the separate tract allotted to Mrs. McCarty in partition, for the collection of her separate part of the unpaid purchase-money. To do so, a joint purchase and joint note are to be transformed into several promises; a lien reserved in 1872 on an undivided interest, is to be converted, by the silent operation of the law, into a lien on the entire title of a severed and separate part of the tract, and this in payment of a promise given in 1876, to pay the promissor's fifth part of the unpaid balance of the joint promise made in 1872. And all this, it is contended, arises by implication of law, notwithstanding complainant, *relying on the promise of Fletcher McCarty, husband of Sallie McCarty*, reported the purchase-money paid, and obtained the decree of the court affirming that fact. The facts, and the conduct of the complainant repel all implication that a lien was retained.—*Sims v. Sampey*, 64 Ala. 230 ; S. C. 68 Ala. 588. This ruling operates a hardship on Mr. Williams, but it is the result of his misplaced confidence.

This cause is still pending in the court below, and it is possible complainant may wish to offer an amendment to his bill. Such motion can be considered only by the chancellor.

The decree of the chancellor is reversed, and a decree here rendered, sustaining defendant's demurrer to the bill.

## Thompson v. Acree.

### *Motion for Summary Judgments against Sheriff.*

1. *Summary judgment against sheriff; when no provision for.*—The statute does not confer on justices of the peace, or on the circuit court, jurisdiction to render summary judgments against sheriffs, for any negligence or misfeasance on their part in levying process issued by, and returnable before justices of the peace.

APPEAL from Covington Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was a motion for a summary judgment against James A. Thompson, the sheriff of said county, and the sureties on his official bond, the appellants, and was commenced by the appellee before a justice of the peace, before whom he obtained a judgment. The cause was then taken by appeal to the Circuit Court, where it was tried *de novo*, the trial resulting in a verdict and judgment for the appellee. The appellants demurred to the motion, but their demurrer was overruled by the court. The other facts are stated in the opinion. The overruling appellants' demurrer is here assigned as error.

W. D. ROBERTS, for appellants. (No brief came to the hands of the reporter.)

GAMBLE & PADGETT, *contra*.—(1). The act of February 26, 1875 (Pamph. Acts 1874–5, p. 181), authorizing sheriffs as such to execute all mesne and final process required by law to be executed by constables, did not make them constables while executing such process, and thereby relieve them from accounting as sheriff. The act merely imposed additional duties on them *as sheriffs*. (2). The law which makes him liable as sheriff to a summary judgment, is the same for failing to execute process issued from a magistrate's court, as for failing to execute process issued from the circuit court.

SOMERVILLE, J.—This is a motion for a summary judgment against the sheriff of Covington county, and the sureties on his official bond, for the negligent failure to execute a writ of attachment.

The attachment issued from a justice's court, and was levied by the sheriff upon certain personal property of the defendant

[Thompson v. Acree.]

in attachment, one Holley. This was done under the provisions of section 731 of the present Code, which authorizes sheriffs to execute all mesne and final process which can be executed by constables.

The main question presented is, whether the justice's court had jurisdiction of the motion.

The statute evidently provides for obtaining summary judgments, not exceeding one hundred dollars, before justices of the peace, against *constables* and against *justices* for certain specified failures of official duty.—Code of 1876, §§ 3663–3675. So the provisions are ample for obtaining such judgments, for any sums over fifty dollars, in the *circuit courts* against sheriffs. Code, §§ 3356–3366.

A careful inspection of the general rules, in reference to motions of this character against *sheriffs*, as comprised in the Code (§§ 3351–3355) will show, we think, a legislative intention to confine such remedies, so far as sheriffs are concerned, exclusively to the circuit courts. Section 3355 prescribes that such a “motion must be made in the circuit court of the county in which such officer [the sheriff] was acting officially at the time of the default, or in the court to which the process was returnable, when the default consists in the failure to execute, or return process, or to pay over money collected thereon. In all other cases not specially provided for, the motion must be made in the circuit court of the county in which the person moved against resides; if he has no permanent residence, then in any county where he may be found.” Construed alone this section might not be entirely clear or free from doubt, but taken in connection with the preceding sections, and especially section 3351, it can have reference to none other than circuit courts.

There is no court which has jurisdiction of *summary motions* against a sheriff for negligences or misfeasances, relating to his levy of process from justices' courts. Sheriffs had no authority to execute such process until the act approved February 26th, 1875 (Session Acts 1874–75, p. 181). Before this date it is clear that circuit courts had no jurisdiction of motions of this nature, and none is conferred by the act in question.

The court below erred in not sustaining the demurrer, and its judgment is reversed, and the cause is hereby dismissed in this court at the cost of the appellee.



[Mohr v. Lemle.]

**Mohr v. Lemle.***Action for Libel.*

1. *Libel; in action for, allegations and proof must correspond.*—The general rule, that the allegations and proof must correspond, applies to actions for slander, verbal or written; and the words proved must correspond substantially with the words alleged.

2. *Amendment; when new and distinct libel can be introduced by.*—Where, in an action for libel, the libel set out and declared on, in the original complaint, relates only to the *solvency* of the plaintiff, and in that respect only touches his character as a merchant, an amendment may be allowed under the statute, introducing another and distinct libel, written and published at a different time from the one described and declared on in the original complaint, and touching the *integrity and the personal conduct* of the plaintiff, without assailing or questioning his solvency. By such amendment the form of action is not changed, and a cause of action *entirely new* is not introduced.

3. *Statute of limitations; its operation touching amendments.*—While new matter, forming an independent cause of action, which was not before the subject of pending suit, and of contestation between the parties, may be introduced by an amendment; yet, such amendment can not have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for the cause of action thereby introduced, at the time of making the amendment. If at the time of the introduction of such new matter, the statute has operated a bar to it, the defendant may insist upon the benefit of the statute, and to him it is as available, as if the amendment were a new and independent suit.

4. *The doctrine of relation; its purpose and operation.*—The whole doctrine of relation rests in a fiction of law, which was adopted to subserve, and not to defeat right and justice.

## APPEAL from Montgomery Circuit Court.

Tried before HON. JAMES Q. SMITH.

This was an action for libel brought by Alex. Mohr, the appellant, who is described in the summons and the complaint as “doing business under the firm name and style of Alex. Mohr, Agent,” against Leopold Lemle, the appellee; and was commenced on the 22d April, 1878. The libel declared on in the complaint as originally filed, which contained only one count, is thus averred therein: “And the said defendant . . . . to-wit: on 20th day of March, 1878, aforesaid, did compose, write and publish, in a certain letter addressed to James Tucker & Co., of and concerning him in his said trade and business, a certain false, scandalous, malicious and defamatory libel, in which said libel is contained, amongst other things, the false and libelous matter in substance following of

[Mohr v. Lemle.]

and concerning plaintiff, and of and concerning him in his said trade and business, that is to say: You (meaning the said James Tucker & Co.) will lose your debt. Alex. Mohr (meaning the plaintiff) is unable to pay it. He (meaning the plaintiff) owes more than he is worth. He (meaning the plaintiff) is not to be trusted. He (meaning the plaintiff) will break shortly." On the 15th December, 1879, the complaint was amended, by adding a new count declaring on a different and distinct libel, which is averred therein as follows: "And the said defendant . . . to-wit: on the 13th day of March, 1878, aforesaid, did compose, write and publish in a certain letter addressed to James Tucker & Co., of and concerning the said plaintiff, and of and concerning him in his said trade and business, a certain false, scandalous, malicious and defamatory libel, in which said libel is contained, amongst other things, the false and libelous matter following of and concerning him in his said trade and business, that is to say: I (meaning the said L. Lemle) refer you (meaning the said James Tucker & Co.) to a letter of recommendation August last [by me] of A. Mohr (meaning plaintiff) of this city as being worthy of credit. I (meaning the said L. Lemle) consider it now my duty to warn you (meaning the said James Tucker & Co.) against him (meaning the said plaintiff), and to be on your (meaning the said James Tucker & Co.) guard. Past actions of his (meaning the said plaintiff) proved to be dishonest, and he (meaning the plaintiff) is therefore, in my (meaning the said L. Lemle) opinion, not entitled to credit."

The defendant pleaded not guilty, and also as to the count introduced by the amendment, the statute of limitations of one year. To this plea, the plaintiff replied, that the cause of action set forth in said count was the same cause of action mentioned and set forth in the original complaint, before the amendment was allowed; and on this replication the defendant took issue. The trial was had on the issues thus made up, and the evidence introduced thereon showed that the plaintiff was a member of a partnership which failed and ceased to do business in 1874, or prior thereto, and that the only business he had carried on since that time was as agent for his wife, who was a free-dealer, and the business was conducted for her account; that on the 13th March, 1878, the defendant wrote a letter to James Tucker & Co., merchants in New York, containing the matter described in the count introduced by the amendment and therein averred to be libelous; but there was no evidence introduced on the trial sustaining the averments as to the matters complained of, as libelous, in the complaint as originally filed.

The Circuit Court charged the jury, on the written request

[Mohr v. Lemle.]

of the defendant, that if they believed all the evidence, they must find for the defendant, and the plaintiff excepted. The plaintiff reserved other exceptions on the trial, which need not be set out in this report. There was a judgment, rendered on verdict for defendant, and from this judgment the plaintiff appealed, and here assigns as error, in addition to other assignments, the ruling of the lower court above noted.

ALEX. TROY, and TROY & TOMPKINS, for appellant.

RICE & WILEY, and DAVID CLOPTON, *contra*.

BRICKELL, C. J.—The general rule, that the allegations and proof must correspond, is applied to actions for slander, verbal or written. The words proved must correspond substantially with the words alleged. The complaint, or declaration, can not be supported by proof of words differing from the words alleged, though of equivalent import.—2 Brick. Dig. 208, § 93. It has not been insisted that the libel given in evidence would have been admissible under the original complaint. The libel therein described was, according to the averments, written and published at a different time from that given in evidence, and related only to the solvency of the plaintiff. In that respect only did it *touch* the plaintiff in his character as merchant.

The amended complaint, by proper averments, introduces the libel given in evidence, purporting to have been written and published at a different time from the writing and publication of the libel described in the original complaint; and the matter of it concerns and *touches the integrity and the conduct of the plaintiff*, without assailing or questioning his solvency. In the leading case of *Crimm v. Crawford* (29 Ala. 626), construing the present statute of amendments, it was said: “Under these statutes, we think there is no limit to the power of amending the allegations of a complaint, except that a party should not be allowed to depart in the complaint entirely from the process, or to substitute an entirely new cause of action, or to make an entire change of parties. Either of these things would be tantamount to the institution of a new suit, and would not be an amendment of the old cause of action.” This construction of the statute has since been observed; and following it, the amended complaint, though introducing a libel differing in substance, not of equivalent import or meaning with that averred in the original complaint, was properly allowed. The form of action is not changed, a cause of action *entirely new* is not introduced. A libel of the plaintiff, in his trade and business as a merchant, written and published before the



[Mohr v. Lemle.]

commencement of suit, addressed to the same parties, is the cause of action averred in both complaints. The substance of the allegations is, however, changed; new matter is introduced, forming a new and independent cause of action, which was not before the subject of pending suit, and of contestation between the parties. The allegations of the complaint are not simply varied to meet the phases in which the evidence may present the matter already in issue, so that there will be a correspondence between allegations and proof; but a libel, essentially distinct and different, in all its parts and tendencies, from that described in the original complaint, is, for the first time, introduced by the amended complaint. While the cause of action remains a libel, written and published of and concerning the plaintiff, *touching* his character and credit as a merchant, there is a total departure from the subject of the libel as averred in the original complaint.

The latitude of amendment allowed the plaintiff, can not be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense. The plaintiff may introduce a new cause of action by amendment; but such amendment can not have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action, at the time of making the amendment. The whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat right and justice. When the amendment introduces a new right, or new matter, not within the *lis pendens*, and the issue between the parties; if at the time of its introduction, as to such new right or matter, the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is as available, as if the amendment were a new and independent suit.—*King v. Avery*, 37 Ala. 169; *Lansford v. Scott*, 51 Ala. 557; *Stringer v. Waters*, 63 Ala. 361.

In *Weston v. Worden*, 19 Wend. 648, the plaintiff declared in *slander* for words charging him with malpractice as a physician, and was permitted to amend by adding words of the same character. But not by adding words charging him with being a *quack*, or practicing without license. These latter words were regarded as a new cause of action, as to which the statute of limitations had probably run. The same question was decided in *Smith v. Smith*, 45 Penn. St. 403, the plaintiff proposing to amend by adding a new count, alleging a different slander, after the right of action was barred by the statute of limitations.

The charge given by the Circuit Court seems to us therefore free from error: First, because there was an entire absence

[Ex parte Sayre.]

of evidence that the plaintiff was a merchant, and that defendant had written or published any such libel as was described in the original complaint. Second, because the libel proved was admissible only under the amended complaint, touched and concerned the plaintiff, as an individual, and not as a merchant, there being no evidence that that was his occupation, was entirely variant from that described in the original complaint, and an action to recover damages for its publication was barred by the statute of limitations before it was introduced by the amendment.

The remaining assignments of error were not insisted on in the argument of counsel, and of consequence have not been considered.

Affirmed.

### *Ex parte Sayre.*

#### *Application for Mandamus to Compel Circuit Court to Reinstate Cause on Docket.*

1. *Ejectment; revivor against heirs and personal representative.*—In ejectment, on the death of the defendant in possession, the right to revive the cause against the heirs for the recovery of the possession of the lands sued for, or against the personal representative for the recovery of mesne profits or rents, must be asserted within eighteen months after the death of the defendant, or it will be lost; and when lost, no recovery can be had in that action.

2. *Same; what can not be regarded as a motion to revive.*—In ejectment, when the death of the defendant in possession “is suggested and proved, and leave granted to plaintiff to revive the suit against his personal representative,” the minute-entry neither giving the name of the personal representative, nor adding “when known,” this can not be regarded even as a motion to revive; and if no other steps to revive are taken in the cause until after the lapse of eighteen months from the death of the defendant, the right to revive having been thereby lost, the court may, on motion, strike the cause from the docket.

This was an application to this court for a writ of *mandamus* by Ruth Sayre and others, petitioners, to compel the Circuit Court of Montgomery county to reinstate on the docket of said court a cause which had been pending in said court, but which had, on motion, been stricken therefrom, and in which the petitioners were plaintiffs. The facts are stated in the opinion.

R. M. WILLIAMSON, for motion.—In an action of ejectment, to recover damages it is necessary to revive; but to recover the possession of the land, it is not necessary, at common law, to

[Ex parte Sayre.]

revive. If, on notice by the casual ejector, the tenant fails to appear, judgment for the recovery of the land may be entered against the casual ejector.—*Ex parte Swan*, 23 Ala. 192; *Crutchfield v. Hudson*, 23 Ala. 393. If judgment can be rendered against the casual ejector, if the tenant fails to appear, why could it not be, when he appears and dies? His absence from the suit is the same in both events. So far as the suit is to recover the land, John Doe and Richard Roe are the sole parties.

W. A. GUNTER, *contra*—(1). In ejectment, under the rules now prevailing, the expiration of the lease of the nominal plaintiff would be no cause of abatement, as the court will always permit an amendment enlarging the term.—Tillinghast's *Adams*, 224–229; *Robinson v. Campbell*, 3 Wheat. 212; *Walden v. Craig*, 9 Wheat. 576, and authorities there cited. (2). But the action of ejectment, in this State, like any other action, abates by the death of the defendant, unless there is a revivor within eighteen months.—*Ex parte Swan*, 23 Ala. 192; *Crutchfield v. Hudson*, 23 Ala. 393; *Evans v. Welch*, 63 Ala. 250; *Pope v. Irby*, 57 Ala. 105; *Brown v. Tutwiler*, 61 Ala. 372. (3). A motion to revive, without designating the person *by name* against whom the revivor is sought, is a nullity. In such case process can not issue to bring in the party.—Code, § 2910; 2 Brick. Dig. p. 132; *Caller v. Malone*, 1 S. & P. 305; *Spence v. Simmons*, 16 Ala. 828; *Turner v. Dupree*, 19 Ala. 188; *Sossman v. Price*, 57 Ala. 204. (4). But if there was a revivor against the personal representatives, they were not the owners of the land, and the revivor should have been against the heirs and personal representatives.—*Ex parte Swan*, *supra*; *Crutchfield v. Hudson*, *supra*; *Evans v. Welch*, *supra*.

STONE, J.—There was an action of ejectment brought in July, 1871, by John Doe, on the demise of several named lessors, against Richard Roe, on which the customary notice was issued to P. W. Donaldson, as tenant in possession, or claiming title to the premises sued for. This cause was several times continued, and on May 16th, 1876, “the death of P. W. Donaldson, the defendant, is [was] suggested and proved, and leave granted the plaintiff to revive this suit against the personal representatives of the defendant, and cause continued.” The name of the personal representative is not given, and no suggestion or motion is made in reference to the heirs. No *scire facias* is shown to have been issued. No other order of the court was made, except continuances, until June 21st, 1879, when the following entry was spread on the minutes: “This day came the parties by their attorneys, and the death of P. W. Donald-



[Ex parte Sayre.]

son, the defendant, is suggested, and on motion leave is granted to revive against the defendant's personal representatives and widow, on notice to be issued to them, and cause continued." No notice is shown to have issued under this order, and it is not shown who was or is the personal representative, who is the widow, or why she should be made a party. No other action, except continuances, is shown to have been had, until December 8th, 1881, when leave was granted to revive in the name of Joseph H. Pope, husband of Lydia Pope, one of the lessors of the plaintiff, whose death was suggested. January 7th, 1882, on motion, the cause was stricken from the docket, for a failure to revive against the heirs and personal representative of Donaldson, within the eighteen months prescribed by the statute. Code of 1876, §§ 2908, 2910.

We need not, and do not determine in this case, what would be our ruling, if the motion had been made to revive against the heirs and personal representative, within eighteen months after the death of Donaldson, and, for some cause, that motion was not acted upon within the eighteen months. That case is not presented by this record, for no motion has ever been made to revive against the heirs. See *Evans v. Welch*, 63 Ala. 250; *Brown v. Tutwiler*, 61 Ala. 372. There can be no question that the plaintiffs have lost their right to revive against the heirs of P. W. Donaldson, and consequently they can not, in this action, recover the possession of the lands.

As to the attempt to revive against the personal representative, should there be a wish to proceed only for mesne profits or rents, the petitioner is in no better condition. The motion was to revive against the personal representative, not the personal representative when known. The implication from this is, that a personal representative had already been appointed. Now, a proceeding against the *personal representative*, without more, is a proceeding against no one.—2 Brick. Dig. 132, §§ 10, 11, 12, 13. More than five years had elapsed since Mr. Donaldson's death had been made known, and the name of the personal representative was never brought to the attention of the court. This can not be regarded even as a motion to revive. Lest we might be misunderstood, we will add, there might possibly be cases in which, the motion being made in time, the mover might not be able to ascertain the name of the personal representative within the eighteen months, by reason that through the delays of litigation, none may be appointed within that time. Whether this would be an excuse or not, we need not positively decide; but there are strong reasons in support of it. To make it available, however, the record should disclose the facts. The law favors speedy trials, and speedy revivals, as a necessary corollary. Bearing on the question of re-

[East et. al v. Eichelberger.]

vivor, after the expiration of a term declared on, we cite without comment, *Lessees of Smith v. McCann*, 24 How. (U. S.) 398; *Van Rensselaer v. Owen*, 33 How. Pr. Rep. 12; *Alden v. Grove*, 18 Penn. St. 377; *Cresap's Lessee v. Hutson*, 9 Gill. 269; *Cheney v. Cheney*, 26 Vt. 606; *Gordon v. Overton*, 8 Yerg. 121; *Torrance v. Betsy*, 30 Miss. 129.

Motion for *mandamus* denied.

## East et al. v. Eichelberger.

*Action by Tax Assessor against Tax Collector and Sureties on his Official Bond for Commissions.*

1. *County taxes levied for special purposes; tax assessors not entitled to commissions on.*—Under the statute regulating the compensation of tax assessors (Code of 1876, § 401), those officers are only entitled to commissions on such county taxes as are levied for the general purposes of the county, or for the ordinary current expenses thereof, and not on county taxes levied for special purposes.

2. *Same.*—A tax assessor is, therefore, not entitled to commissions on taxes which were levied by the court of county commissioners for the purpose of rebuilding or repairing the county jail.

APPEAL from Randolph Circuit Court.

Tried before Hon. JOHN HENDERSON.

The facts are sufficiently stated in the opinion.

JOHN T. HEFLIN, for appellants.

(The record does not disclose the name of appellee's counsel.)

SOMERVILLE, J.—This is a suit by the appellee, as tax assessor, against the tax collector of Randolph county and the sureties on his official bond, for a sum of money claimed to be due plaintiff as commissions on certain *special* taxes, levied by the court of county commissioners for the purpose of rebuilding and repairing the county jail. These taxes were collected by the tax collector, and paid into the county treasury without reserving any commissions for the assessor, as it is the duty of tax collector to do in the case of *general* taxes.

It is urged by appellant's counsel that the statute regulating the compensation of tax assessors can not be construed to authorize them to charge commissions on special taxes levied for county purposes, but only on general taxes, or such as are levied for the ordinary current expenses of the county. It is our

[East et al. v. Eichelberger.]

judgment that this is the proper construction of section 401 of the Code relating to this subject.

A cursory glance at the duties of tax assessors renders this view obvious. They are required, in the first place, diligently and carefully to ascertain every article of property subject to taxation in their respective counties.—Code, 1876, § 393. The duty is further enjoined of making out a book of assessment which is required to be returned to the judge of probate on or before the first Monday of July of each year.—*Ib.* § 400. In this book the assessor is required to enter a list of the taxable property of each tax payer in his county, with the value of each article or item, as adjudged by the assessor, and the amount of deductions to which he may be entitled.—*Ib.* 389. After the faithful discharge of these duties, which involve the assessment of escaped taxes and a personal demand by the assessor on delinquents, nothing more remains to be done by him. His official duties are ended.

His compensation, as specified in section 401 of the Code, is for these services. It is in the form of a percentage, or rate of commission, on the amount of taxes received by the tax collector for the State, and also the like rate of commission “upon the amount of the county taxes.”—*Ib.* § 401. We are of opinion that this means the amount of *general* taxes, or such as are levied and collected for the ordinary current expenses of the county. It can not be construed to include *special* taxes, or such as are levied for specific or particular purposes. The levy and collection of the latter class of taxes impose no additional labor or service on the assessor. It can not be intended that he should receive extra compensation, originating in the accidental and unforeseen necessities of the county, when he performs no additional service as a *quid pro quo* for such compensation. All county taxes are levied by the several courts of county commissioners, being merely based upon the list of taxable property and valuations prepared by the assessor. It is the duty of the probate judges, not of the assessors, to “make a book containing in concise form the amount of taxes due by each tax payer,” as required by the statute, which book is delivered to the tax collector, and, in each several case, constitutes his warrant of authority to collect the taxes so assessed and levied.—Code, 1876, § 435.

We think that the equity of the whole scheme of compensation, provided by the statute in the case of tax assessors, can be better preserved by being guaged with reference to the general taxes of the county. This is the natural and more reasonable construction of the law, and works no injustice to any one. It should therefore prevail.

This view of the case renders unnecessary the consideration



[McCullough v. Flournoy.]

of any other question raised by the record. The rulings of the court were adverse to the conclusion above reached; and the judgment of the Circuit Court will be reversed and the cause remanded.

## McCullough v. Flournoy.

*Bill in Equity by Attorney to Establish a Lien on Real Estate of his Client for Fees.*

1. *Lien of attorney does not extend to lands which have been subject of suit.*—A solicitor who has successfully prosecuted a suit in equity to establish the title of his client to real estate, has no lien on such real estate for his fees. *Hinson v. Gamble*, 65 Ala. 605, cited and approved.

APPEAL from Coffee Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity filed by the appellee, an attorney, seeking to establish and enforce a lien on land of his client for services rendered by him as solicitor, in successfully prosecuting a suit in said Chancery Court, which resulted in a decree divesting the title to the land out of the respondent in that suit, and vesting it in his client. On the hearing, had on pleadings and proof, and also on a motion to dismiss the bill for want of equity, the chancellor was of the opinion, that the appellee was entitled to relief, and caused a decree to be entered overruling the motion to dismiss, and declaring a lien on the land for the services so rendered by the appellee, and ordering the land sold for the payment of the amount due therefor. This decree is here assigned as error.

W. D. ROBERTS, for appellant.

J. E. P. FLOURNOY, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The single question this case presents—whether a solicitor, successfully prosecuting a suit in equity to establish the title of his client to real estate, has a lien on the estate for his fees—was decided in *Hinson v. Gamble*, 65 Ala. 605. The existence of such a lien is recognized in Tennessee, but it is repudiated in other States.—*Hunt v. McClanahan*, 1 Heisk. 503; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Humphrey*

[Atkinson v. Wiggins.]

*v. Browning*, 46 Ill. 476; *Smalley v. Clark*, 22 Vermont, 598; *Cozzens v. Whitney*, 3 R. I. 79; *Hanger v. Fowler*, 20 Ark. 667. It seems to us unwarranted by principle to extend the lien of an attorney or solicitor to lands, which have been the subject of suit. There would be much of difficulty and confusion resulting from it, embarrassing alienation it is the policy of the law to unfetter.

The decree of the chancellor must be reversed, and a decree will be rendered, dismissing the bill, at the costs of the appellee in this court, and in the court of chancery.

## Atkinson v. Wiggins.

### *Attachment.*

1. *Section 3606 of the Code construed.*—Section 3606 of the Code of 1876 requiring suits before justices of the peace to be brought in the precinct of the defendant's permanent residence, or in the precinct in which the debt was created, or in which the cause of action arose, is confined in its operation to suits commenced by summons, and has no reference to suits by attachment of goods, which are in their nature proceedings *in rem*.

APPEAL from Covington Circuit Court.

Tried before Hon JOHN P. HUBBARD.

The opinion states the facts.

W. D. ROBERTS, for appellant.

GAMBLE & PADGETT, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The present suit was commenced by attachment, issued by, and returnable before a justice of the peace in Covington county. The attachment was sued out to enforce the statutory lien of a landlord for alleged advances made to his tenant, the sum claimed being for money and provisions advanced to said tenant to enable him to make a crop on the lands of the plaintiff. The defendant pleaded in abatement that when the suit was brought, and ever afterwards, he had been and was a resident householder and freeholder of another county. Plaintiff demurred to this plea, and the court overruled his demurrer. Plaintiff then replied that the suit had been com-

[Danner &amp; Co. v. Brewer &amp; Co.]

menced by attachment, and the court sustained a demurrer to this replication; and plaintiff declining to plead further, there was judgment for the defendant.

The Circuit Court erred in overruling plaintiff's demurrer to the plea in abatement. Section 3606 of the Code of 1876, which requires that suits before justices shall be brought in the precinct of the defendant's permanent residence, or in the precinct in which the debt was created, or in which the cause of action arose, is confined in its operation to suits commenced by summons, under sections 3604-5, immediately preceding. It has no reference to suits by attachment of goods, which are in their nature proceedings *in rem*.—*Herndon v. Givens*, 16 Ala. 261.

Reversed and remanded.

## Danner & Co. v. Brewer & Co.

### *Bill in Equity to have Mortgage declared a General Assignment.*

1. *Assignments; validity of prior to the Code.*—It was regarded as settled, that prior to the adoption of the Code, a debtor, though in failing circumstances, could convey the whole, or a part of his property by assignment or other form of conveyance operating as a security, to pay the whole or a part of his creditors in unequal proportions; and the only qualification to this right and power of the debtor was, that the uses must have been distinctly declared, and the property, in good faith and without the reservation of any benefit to the debtor, devoted to the payment of the prescribed debts.

2. *General assignment; § 2126 of the Code construed.*—Section 2126 of the Code of 1876 does not annul, as fraudulent, a general assignment creating preferences or priorities, but merely destroys such preferences or priorities; while the assignment is preserved, and enures to the benefit of all the grantor's creditors equally.

3. *Same; what operates as under the Code.*—Whatever may be the form of the instrument, if it is a transfer of substantially all the debtor's property which is subject to the payment of his debts, or, in its operation and effect, there is an appropriation of the property, for the security, or payment of one or more of his creditors to the exclusion of all others, or a preference to one or more of them is thereby given, and if the property is redeemable on payment of the debts, or a trust results, expressly or by implication, to the debtor of any surplus which may remain after the debts are satisfied, the instrument falls within the statute, and thereby all preferences and priorities appointed by the instrument are annulled, and the assignment enures equally to the benefit of all the debtor's creditors.

4. *Same; when two or more instruments construed as.*—While a conveyance or transfer of a part of the debtor's property for the security of debts, is a *partial*, not a *general* assignment, and, therefore, not within



[Danner &amp; Co. v. Brewer &amp; Co.]

the operation of the statute; yet, if, when the partial assignment is executed, other and successive transfers or conveyances are contemplated, covering all the debtor's property, the several instruments, when executed, will be taken together, and will form a general assignment, upon which the statute will operate.

5. *Same; an absolute sale does not operate as.*—A sale, absolute, unconditional, and free from all reservation, in payment of antecedent debts, is not a general assignment, and is not affected by the provisions of section 2126 of the Code of 1876.

6. *Same; when mortgage executed to secure new debt construed as.*—A mortgage executed by a debtor, conveying substantially all his property as security for pre-existing debts, which are extended contemporaneously with the execution of the mortgage, and also for advances which the mortgagee stipulated in the mortgage to make to the mortgagor, and which were afterwards made in pursuance of such stipulation, is a general assignment under the Code, and the security thereby created enures equally to the benefit of all the then existing creditors of the mortgagor.

7. *Same; rights of creditors thereunder not affected by subsequent acts of the parties.*—The rights of creditors secured by an assignment attach at the time of its execution, and can not be divested or affected by any subsequent acts of the assignee and assignor, had and done without notice to them, and without their assent.

8. *Same.*—When a mortgage with power of sale is executed by a debtor to secure one of his creditors, conveying substantially all his property, and thereby becoming a general assignment under the Code, and after the law-day, and upon default in the payment of the debt secured, the mortgagee, without executing the power of sale, enters into a new contract with the mortgagor, by which he becomes the purchaser of the mortgaged property, and the same is conveyed to him,—such contract of purchase and conveyance can not affect the rights of other creditors of the mortgagor, who under the provisions of the Code, are entitled equally with the mortgagor, to the security afforded by the mortgage.

9. *What creditors are secured by general assignment.*—A mortgage which becomes a general assignment under the influence of the Code, enures only to the benefit of creditors whose claims or demands were in existence at the time of its execution; and their rights can not be diminished by a claim of participation preferred by subsequent creditors.

10. *Real estate governed by the law rei site.*—Real estate, as to its enjoyment and transmission, is governed by the law of the place where it is situated.

11. *Common law presumed in Mississippi.*—In the absence of proof, the presumption is that the common law prevails in Mississippi.

12. *Same; effect on mortgage of lands.*—Under this presumption it is held, that a mortgage, executed by a debtor in this State, to secure one of his creditors, and conveying substantially all his property, including lands in Mississippi, as to such lands, does not operate as a general assignment.

13. *Bill in equity; when averments too vague and uncertain.*—A creditor seeking to have a mortgage executed by his debtor declared a general assignment on the ground that it conveys substantially all the debtor's property, must show by his bill, that his debt existed at the time of the execution of the mortgage. An averment that "a large portion of the debt existed prior to" the date of the mortgage is too vague and uncertain to entitle him to participate in the security afforded by it.

APPEAL from Mobile Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The bill in this case was filed on November 23d, 1881, by L. Brewer & Co., Haralson & Co., Wollner, Hirshberg & Co.,

[Danner &amp; Co. v. Brewer &amp; Co.]

T. Prudhomme and others, creditors of Garland M. Dees, against him, and A. C. Danner, George W. Robinson and Benjamin F. McMillan, partners trading under the firm name of A. C. Danner & Co., for the purpose of having a certain mortgage and deed executed by Dees to Danner & Co. declared a general assignment.

The case made by the bill, so far as passed on by the court, is as follows: On 18th February, 1880, Garland M. Dees executed to A. C. Danner & Co. a mortgage, whereby he conveyed to them a large amount of real and personal property in Alabama, and also a large tract of land located in the State of Mississippi. A copy of the mortgage, as an exhibit, is made a part of the bill; and its recitals show, that it was executed "for and in consideration that the said Garland M. Dees is indebted to the mercantile firm of A. C. Danner & Company, on their book account, at this date amounting to about the sum of ten thousand dollars, and in the further consideration, that the said firm has this day agreed and bound themselves in writing, among other things, to aid the said Dees in his general business, in extending the said amount now due, as hereinafter specified, and in addition thereto, to advance, accept, endorse for, or pay cash for him, the said Dees, as he may need the same, to the sum of three thousand dollars, in addition to the said sum now due, making a line of credit in all not exceeding the sum of thirteen thousand dollars, which said indebtedness is to be paid as hereinafter expressed," and as and for a security for said indebtedness and advances. The defeasance contained in the mortgage provides, that the mortgage is made "upon the condition, however, that if the said Garland M. Dees shall pay or cause to be paid the said indebtedness with interest and commissions for advancing, as per agreement this day made, that is to say, that said indebtedness is to be paid by payments of one thousand dollars monthly, until all of said indebtedness is paid, the first payment to be made on or before the 1st day of May next, and a like payment of one thousand dollars on the 1st day of each succeeding month thereafter, until full payment is made.—Now, if said payments are well and truly made as agreed, then and in that case this conveyance is to be and become null and void." Then follows a power of sale, by which the mortgagees are empowered, upon the failure by Dees, to make any one of the stipulated monthly payments, to sell the property at public outcry, after having first given twenty days' notice of the time, place and terms of sale, by publication in some newspaper published in the city of Mobile. It is also provided in the mortgage, that any surplus of the proceeds of sale left after paying expenses, and the indebtedness secured, should be paid over to Dees. The bill avers, that this mortgage conveyed "all the

[Danner &amp; Co. v. Brewer &amp; Co.]

property then owned by said G. M. Dees, that could be reached by an execution at law from a court against said Dees, and that it was made to secure past indebtedness and for advances to be made to him in future, and is, therefore, a general assignment for the benefit of all his creditors at the time said mortgage was made." On the 14th July, 1881, Garland M. Dees and his wife executed to A. C. Danner & Co. an absolute deed, thereby conveying to them in fee the property conveyed by said mortgage, and also some other property alleged in the deed to have been purchased by Dees with funds obtained from Danner & Co. A copy of this deed is also made an exhibit to the bill. The consideration of the deed, as recited therein, was the release of Dees by Danner & Co. from the debts and liabilities secured by the mortgage, and also from other debts which he owed them, and an agreement on the part of Danner & Co. to pay off and discharge certain debts therein described, which Dees owed to other parties, and to surrender to him certain notes made by one M. A. Dees, and a mortgage securing the same, which were then held by Danner & Co. as additional security for the payment of their claims against Garland M. Dees. The bill avers, that this deed covered all the property owned by said Garland M. Dees at the time of the execution thereof "that could be reached by an execution at law against said G. M. Dees," and that it was a general assignment for the benefit of all the creditors of said Dees.

It is also shown by the averments of the bill, that the debts which Garland M. Dees owed to J. Prudhomme and Wollner, Hirshberg & Co., respectively, existed prior to the date of the execution of the mortgage of February 18th, 1880. The averment of the bill describing the debt of Haralson & Co. is as follows: "Your orators, Haralson & Co., show that Garland M. Dees was indebted to orators in the sum of four hundred and fifty-seven 92-100 dollars, a large portion of the same existed prior to the 18th day of February, 1880, and that said sum of money is justly due, with interest thereon." It is also shown by the averments of the bill, that the debts due from the said Dees to L. Brewer & Co. and the other complainants, respectively, existed prior to the execution of the deed of July 14th, 1881; but it is not shown that said debts existed at the time of the execution of the mortgage of February 18th, 1880.

The defendants, A. C. Danner & Co., demurred to the bill, and assigned, among others, the following grounds: 1. That creditors of said Dees, whose debts existed prior to the execution of the mortgage of February 18th, 1880, are united, as parties complainant, with creditors of said Dees, whose debts are not shown to have existed at the time of the execution of



[Danner &amp; Co. v. Brewer &amp; Co.]

said mortgage. 2. That it appears in and by said bill, and the exhibits thereto, that A. C. Danner & Co. were mortgagees for present value, when they took and received from said Dees their said mortgage of February 18th, 1880; and that said deed of July 14th, 1881, was executed, not as an assignment for the use of creditors, but as an absolute conveyance, in payment of certain debts in said deed described, such payment being the consideration of said deed. Said defendants also demurred to so much of the bill as sought "relief against, or on account of the conveyance of the lands in the State of Mississippi, or to subject them or the proceeds thereof, in this proceeding," on the ground, that the court was without jurisdiction in this cause to declare the conveyance thereof a general assignment.

The cause was submitted for decree on the demurrer; and on the hearing thereof, the Chancery Court rendered a decree overruling the demurrer; and from this decree Danner & Co. appealed, and here assign the same as error.

H. PILLANS, for appellant.—(1). Creditors whose debts existed prior to the execution of the mortgage of February 18th, 1880, are joined as parties complainant with creditors whose debts were contracted after the execution of the mortgage, all seeking to have it declared a general assignment. For this reason the bill is multifarious. (2). The demurrer should have been sustained to so much of the bill as attacks the validity of the conveyance of the Mississippi lands.—*Lide v. Parker*, 60 Ala. 165. (3). It is well settled that the deed of July 14, 1881, can not be declared a general assignment.—*Eskridge v. Abraham*, 61 Ala. 134; *Seaman v. Nolen*, 68 Ala. 463; *Crawford v. Kirksey*, 55 Ala. 282; *Young v. Dumas*, 39 Ala. 60. (4). The appellants were mortgagees for present valuable consideration. *Thames v. Rembert*, 63 Ala. 572; *Thurman v. Stoddard*, 63 Ala. 336; *Robinson v. Tipton*, 31 Ala. 607; *Cook v. Parham & Blount*, 63 Ala. 456-460. (5). The mortgage to appellants, being for a present valuable consideration, did not operate as a general assignment. (a). "There are three points to be considered in the construction of all remedial statutes: the old law; the mischief; and the remedy. . . . And it is the business of the judges so to construe the act as to suppress the mischief, and advance the remedy."—1 Bl. Com. pp. 87, 61; *Blakeney v. Blakeney*, 6 Porter, 109-119; *Huffman v. The State*, 29 Ala. 40. (b). Prior to the statute a failing creditor, by general assignment of all his effects, might have preferred any creditor or creditors he chose.—*Richards v. Hazzard*, 1 S. & P. 139; *Stover v. Harrington*, 7 Ala. 153. And, though he would have thereby exhausted his entire estate, he might have, nevertheless, lawfully stipulated that those who accepted the property

[Danner &amp; Co. v. Brewer &amp; Co.]

and released him, should receive preference of payment in full, to the exclusion of others, thus extorting releases.—*Robinson v. Rapelye*, 2 Stew. 86–100; *Ashurst v. Martin*, 9 Porter, 566; *Grimshaw v. Walker*, 12 Ala. 101; *West v. Snodgrass*, 17 Ala. 549; *Rankin v. Lodor*, 21 Ala. 380. These cases were invariably founded on *voluntary general assignments*, for existing unsecured creditors, and exhibited to the legislature and the profession a glaring evil; one regretted by the courts, and reluctantly legalized by their sanction, (see opinion of ORMOND, J., 4 Ala. pp. 379–81, quoting Judge Gaston's language in 1 Iredell, 490, and *per* KENT, Ch., in 3 John. Ch. 453), that is, the existence of a *lawful* power in an insolvent and hopeless debtor, to diminish and destroy the security that his possession of his estate had afforded all creditors who had dealt with him, by appropriating the whole of that estate to the preferred payment of creditors selected by him without regard to merit, capriciously, and even for the purpose of extorting from them a reluctant discharge as the price of such debtor's bounty. (c). The legislature provided for the correction of this evil—1st, by the adoption of the law of 21st January, 1850, now section 2125 of the Code of 1876, which cut off the trafficking by debtors in forced releases; and 2d, by the adoption of the Code of 1852, with section 1556 therein incorporated as a natural sequence to the law of 21st January, 1850 (numbered as section 1555 therein), and the classification of these laws under Art. I, "Of the prevention of frauds and perjuries;" of Chap. iv, "of void contracts." This section, 2126 of the Code of 1876 (1556 of the Code of 1852), used words of very usual and well known significance, which had been constantly used in cases cited, in the sense of instruments assigning everything to pay pre-existing creditors their debts, and had never been otherwise applied. The correction of the practice of making voluntary preferences in such instruments was the very evil struck at. Upon the canon of interpretation above written, then, we should, even were a more vague or looser expression used than "general assignment," confine the statutes to voluntary assignments of whatever form without present consideration, by the hopeless debtor for the benefit of his existing creditor or creditors, because that was the cure manifestly required. On the other hand, the common transaction whereby a creditor, who needs ready money or present relief from pressing debt by obtaining extensions, *bona fide* secures such relief upon and by a mortgage executed contemporaneously, for such present value and consideration, so far from being disfavored, has ever been held by our courts to be such as entitled the mortgagee to stand in that most highly favored light of being regarded as a *bona fide* purchaser for value, against whom latent equities can never afford relief.—*Thames*

[Danner &amp; Co. v. Brewer &amp; Co.]

*v. Rembert*, 63 Ala. 561; *Thurman v. Stoddart*, *Ib.* 336; *Cook v. Parham*, *Ib.* 456; and older cases cited. (d). Mortgages for present valuable consideration have never been esteemed by the courts or the profession to be general assignments within the statute. Every case thereon which has come to this court has arisen upon transactions, wherein no element of new consideration passed at the execution of the instrument. They were merely cases of assignments as collateral to debts already existing.—*Holt v. Bancroft*, 30 Ala. 193; *Price v. Mazange*, 31 Ala. 701; *Warren v. Lee*, 32 Ala. 440; *Stetson v. Miller*, 36 Ala. 642; *Longmire v. Goode*, 38 Ala. 577; *Rapier v. Gulf City Co.*, 64 Ala. 333. The case of *Shirley v. Teal*, 67 Ala. 449, furnishes the first exception, and if we may judge by the record in that case, the point here made was little urged upon the consideration of the court. (e) This legislation finds a parallel in the thirty-fifth section of the Bankrupt Act, forbidding and avoiding preferences given by insolvent debtors to any creditor by “payment, pledge, assignment, transfer or conveyance, of any part of his property absolutely or conditionally,” etc. Under this section of the Bankrupt Act the very question under discussion arose, and the Federal Supreme Court unanimously held, that it in no wise affected or invalidated a mortgage made by the struggling debtor to obtain present aid.—*Tiffany v. Boatman's Inst.*, 18 Wall. 375. (6). If the mortgage is subject to be treated as a general assignment, the complainants delayed too long before manifesting an intention to elect to so treat it. They waited nearly two years before filing their bill, or signifying their intention to claim as beneficiaries, and until the appellants had released Dees of a demand of nearly \$30,000, indeed of all demands whatever; and they now seek to displace the appellants and take all for themselves. The court will not grant relief in such case.—Story's Eq. Jur. § 1097; *Robinson v. Cullman & Co.*, 41 Ala. 693; *Frazer v. Lee*, 42 Ala. 25; *Calloway v. Gilmer*, 36 Ala. 358; *Andrew v. Hobson*, 23 Ala. 236; *Reaves v. Garrett*, 34 Ala. 562.

BOYLES, FAITH & CLOUD, *contra*.—(No brief came to the hands of the reporter.)

BRICKELL, C. J.—Assignments for the benefit of creditors, their validity and operation prior to the adoption of the Code, have been the subject of much contention, and frequent judicial decision. It was regarded as settled that a debtor, though in failing circumstances, or involved, could convey the whole or a part of his property, by assignment, or by any form of conveyance or transfer, operating, or intended to operate as a security, to pay the whole or a part of his creditors in unequal



[Danner &amp; Co. v. Brewer &amp; Co.]

proportions; and the only qualification of the right and power of the debtor, was that the uses must have been distinctly declared, and without the reservation of any benefit to himself, the property must have been in good faith devoted and appropriated to the payment of the prescribed debts.—1 Brick. Dig. 128, §§ 75–8. The Code wrought, and was intended to work a radical change in the right and power of the debtor in the transfer of his property for the payment or security of his creditors. It was first provided that “every deed of trust, mortgage or other security hereafter made to secure any pre-existing debt, whether such debt is due or not, or absolute or conditional, is fraudulent and void as to the creditors of the grantor, when any creditor provided for thereby is required to make any release, or to do any other act, impairing his existing rights, before participating in, or receiving the securities therein provided for him.”—Code of 1876, § 2125. This statute abrogated, and was intended to abrogate, the rule announced in an early decision of this court, and subsequently though reluctantly adhered to, that assignments, mortgages or deeds of trust, for the security of debts, were valid, though stipulating for the release of the debtor, as the condition on which the creditor could take the benefit of the security—in other words, making it a condition that the creditors should accept the provisions of the security in full satisfaction of their demands.—*Robinson v. Rapelye*, 2 Stew. 86; *Ashurst v. Martin*, 9 Port. 566; *Gazzam v. Poyntz*, 4 Ala. 374; *Grimshaw v. Walker*, 12 Ala. 101; *West v. Snodgrass*, 17 Ala. 549.

The preference of particular creditors by the debtor making a general assignment of his property, a conveyance or transfer of all or substantially all of his property, for the security or payment of debts, was also, as we have seen, recognized. The Code declared: “Every general assignment, made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally.”—Code of 1876, § 2126. The object and purpose of this section is unlike that of the preceding section. It does not annul as fraudulent a general assignment creating preferences or priorities, not exacting conditions from creditors claiming or accepting its provisions. The assignment is preserved, and it is declared that it “shall be and enure to the benefit of all the creditors of the grantor equally.” The preferences or priorities are blotted out, are annulled, and the assignment is read, and effect given to it, as if the statute were incorporated into it—as if instead of the preference or priority, a security for the benefit of all creditors equally, was expressed.—*Price v. Mazange*, 31 Ala. 701; *Rapier v. Gulf*

[Danner &amp; Co. v. Brewer &amp; Co.]

*City Paper Co.*, 64 Ala. 330. The purpose of the statute is to prohibit a debtor, making a transfer of substantially all of his property as a security for the payment of his debts, from discriminating between his creditors. Such transfers are but seldom, if ever made, except in the presence of actual insolvency, or under the pressure of apprehensions of it. If it is not an open confession of the debtor's inability to pay his debts fully, it is at least a confession that of it there is so much doubt, that it is necessary for the protection of the preferred creditor that security enuring to his exclusive benefit should be given. The policy of the statute is the promotion of equality among creditors—the withdrawal from the debtor of the power to make distinctions, giving preferences among them, a power often most capriciously exercised; and generally in favor of *confidential creditors*, as they are termed; creditors who have furnished the failing debtor with the means of obtaining credit to which he was not entitled, involving in loss the unsuspecting and fair dealing creditor.

The form or character of the instrument creating the preference or priority is not important. Whether it falls within the influence of the statute is not determined by the inquiry, whether it is technically an assignment, or a mortgage, or a deed of trust, or other form of security for the payment of debts. The statute is directed against substance, against things, not against forms or names. Whatever may be the form of the instrument, if it is a transfer of substantially all of the property of the debtor, subject to the payment of debts—if in its operation and effect according to its terms, there is an appropriation of the property for the security, or for the payment of one or more creditors to the exclusion of all others—or, giving preference or priority to one or more creditors—if the property is redeemable on payment of the debts—if by express terms, or by implication of law a trust results to the debtor of any surplus which may remain after satisfying the debts, the instrument falls within the statute, all preference or priority of payment or security appointed by it, by the intervention of the statute, is annulled, and it enures to the benefit of all creditors equally.—*Warren v. Lee*, 32 Ala. 440; *Longmire v. Goode*, 38 Ala. 577; *Perry Ins. and Trust Co. v. Foster*, 58 Ala. 502; *Rapier v. Gulf City Paper Co.*, 64 Ala. 344; *DuBose v. Carlisle*, 51 Ala. 590. The statute is intended to operate upon conveyances or transfers of *all* the debtor's property for the security of debts, as distinguished from a conveyance or transfer of parts of it for that purpose. The conveyance or transfer of all of the debtor's property having as an incident the redeemable quality, or from which a trust of the surplus remaining after the payment of the debts

[Danner &amp; Co. v. Brewer &amp; Co.]

intended to be secured results, is within the purview of the statute, and a general assignment. A conveyance or transfer of a part of the debtor's property for the security of debts, is a *partial*, not a *general* assignment, and not within the operation of the statute. Yet, if when the partial assignment is executed, other and successive transfers or conveyances are contemplated, covering all the debtor's property, the several conveyances, when executed, will be taken together and will form a *general* assignment, upon which the statute will operate.—*Holt v. Bancroft*, 30 Ala. 93; Burrill on Assignments (3d Ed.) § 128.

An absolute sale, unconditional, free from all reservation, in payment or satisfaction of antecedent debts, is not within the statute.—*Crawford v. Kirksey*, 55 Ala. 382, S. C. 50 Ala. 590. Though sales are often denominated assignments, yet between them and the transactions to which the statute refers, there is a broad and manifest distinction. By a sale the vendor strips himself irrevocably and absolutely of all right, title and interest, present or future, in the subject-matter of the sale. There is no right of redemption remaining in him—no trust resulting to him in any event. . An assignment, whatever may be its form, has these incidents and qualities. It is subject to the uses and trusts declared in it, and which must be distinctly declared, or it will be void as to creditors. The satisfaction or extinguishment of these uses and trusts results in a divesture of the title the assignment creates; or results in a trust of the residue of the property or its proceeds, unappropriated after the satisfaction of the uses and trusts. The sale operates an immediate satisfaction of the debts taken in payment—the assignment does not of itself pay or satisfy debts; it simply provides for, or secures payment.—Burrill on Assignments (3d Ed.), § 6; *York County Bank v. Carter*, 38 Penn. St. 446; *Johnson v. McGrew*, 11 Iowa, 151.

When a general assignment is executed, the operation of the statute is to engraft upon it, whatever may be its form, or its terms, a trust for the benefit of all creditors. The trust, at their election, is capable of enforcement in a court of equity, though they have not established their debts by judgments at law—though they have not resorted to or exhausted legal remedies.—*Holt v. Bancroft*, 30 Ala. 193; *Crawford v. Kirksey*, 50 Ala. 590.

It is not denied that, if the mortgage executed by Dees on the 18th February, 1880, had been a security for the payment of antecedent debts only, it would have been a general assignment, which under the statute enures to the benefit of all the creditors of the mortgagor equally. The proposition is, that as the time of payment of the debt due from Dees, the mortgagor, to Danner & Co., the mortgagees, was extended, and



[Danner &amp; Co. v. Brewer &amp; Co.]

Danner & Co. bound themselves to make, and did make future advances to Dees in consideration of the mortgage, and upon the faith of its security, the mortgage is not within the operation of the statute; that it is only assignments of which pre-existing debts form the consideration and not assignments for which there is a new and present consideration, constituting the assignee a *bona fide* purchaser, protecting him against outstanding equities of which he had no notice, to which the statute refers. This proposition was suggested, but was not passed upon in *Holt v. Bancroft*, *supra*, the court saying: "Such a preference could not be maintained in favor of one not a purchaser for value; whether it could in favor of such a purchaser, is a question outside of this case, and we do not decide it." In the recent case of *Shirley v. Teal*, 67 Ala. 449, the question was directly presented, and directly decided: We said: "The purpose of the statute is to prohibit a debtor from exercising the right which he had at common law to prefer one creditor to another, where he seeks to do so by disposing of all of his property by mortgage or other like security. Its policy is similar in nature and design to that of all bankrupt laws, which is to secure a *pro rata* disposition of the assets of insolvent debtors equally among all their creditors. The fact that all of the grantor's property, or substantially all, is included in the conveyance, seems, in such cases, conclusive of the fact of his insolvency. . . . The statute prohibits the giving by a debtor of a preference or priority of payment, by general assignment, to one or more creditors. It makes no distinction between the creditor of a day and one of an hour. The age of the debt is not material." When the statute is taken and read, as it must be, in connection with the law as it had existed, its purposes and objects seem plain. When the debtor is parting with substantially all of his property to secure the payment of debts, the statute intervenes. It does not strip the debtor of the power to assign or transfer his property in any appropriate form, for the payment or security of his debts. Of its own force, it does not annul any and all preferences or priorities of payment, he creates. Such preferences or priorities, at the election of existing creditors, he is deprived of the power of creating, if he is parting with all his property in any mode as a security for the payment of debts. The statute is directed against the power of the debtor—it is intended to deprive him of a recognized power at common law—the power of preferring his creditors by a general assignment. It would be of frequent and easy evasion if the preferences could be created for the payment of debts presently created, or for the security of antecedent debts into which a new consideration is introduced. This statute interdicts the creation of such preferences or priorities, and it is doubtless a part of its policy,

[Danner &amp; Co. v. Brewer &amp; Co.]

to interdict them in general assignments founded upon a new or contemporaneous consideration, most often given at the expense of creditors generally, by embarrassed debtors struggling to continue business, or to maintain credit. There is not in the words of the statute, nor in its purposes or objects, as we ascertain them by a comparison of the statute with the prevailing law, the mischief which it was intended to cure, any room for excepting from its operation general assignments made upon a new or present consideration.

The assignment enures, however, only to the benefit of creditors whose claims or demands are in existence when it is made. These only have then an equitable claim upon the property of the debtor, the statute is intended to preserve and enforce. Subsequent creditors are not within its scope or purview. Under the statute all existing creditors are let in as the beneficiaries of a general assignment. If the assignment were so written, if the creditors were specially named, the statute would not be offended and there would be no reason or equity in the claim of subsequent creditors to participate in its benefit. Such is the legal effect and operation of the assignment, though expressed to be for the security of a single creditor, and the rights of existing creditors who may intervene and claim its benefits can not be diminished by the claim of participation preferred by subsequent creditors.

The rights of creditors attaching at the time of the execution of the assignment, it follows they can not be divested or affected by any subsequent act of the assignee and the assignor, had and done without notice to them and without their assent. The law intervenes and declares the uses and trusts, and converts the assignee into a trustee for their execution. The assignment may be, and most often is, executed without the knowledge of the creditors generally—the creditors to whom the statute extends its benefits. Trusts are frequently created for the benefit of persons who have no knowledge of them, yet they have the unqualified right to affirm them, when informed of their creation.—*Cumberland v. Codrington*, 3 Johns. Ch. 229; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Brooks v. Marbury*, 11 Wheat. 78; 2 Story's Eq. § 1036 *a*. What would be the consequence, if the creditors generally, having notice of the assignment, did not in a reasonable time manifest an intention to claim its benefits, or if having notice of it, they suffered its trusts to be executed without objection, or without intervening to claim under it, is not a question we are now required to consider. By the terms of the mortgage, if there was default in the payment of the secured debts, the foreclosure was to be had by the execution of the power of sale. The sale was to be public, made after the giving of twenty days notice by adver-

[Danner &amp; Co. v. Brewer &amp; Co.]

tisement. Instead of a foreclosure, the mortgagees entered into a new contract with the mortgagor, by which they became the purchasers of the property, within a short time after default in the payment of the mortgage debt, and after the prescribed time of foreclosure by sale. As to the creditors entitled equally with the mortgagees to the security of the mortgage, this transaction is without effect. Their rights could not be impaired or destroyed by the acts of the mortgagor and mortgagees, of which they did not have notice, and to which they did not assent.

It is this last transaction which is claimed by the creditors whose debts were not in existence when the mortgage was executed, to have the effect of a general assignment. But it was a sale, absolute, unconditional, not having any of the incidents or qualities of an assignment, and is not within the influence of the statute.

The statute is in abrogation of the common law—is introductive of a new principle, giving to the assignments to which it refers an operation and construction different from that which the common law attached to them. The presumption is, the common law prevails in Mississippi, where a part of the lands embraced in the mortgage is situate. The law of Mississippi, not the law of Alabama, must determine the nature and extent of the estate and interest, legal or equitable, passing by the mortgage in and to the lands there situate.—Story, Con. Laws, § 445; *Nelson v. Goree*, 34 Ala. 565. The principle is quite universal, that real estate, as to its enjoyment and transmission, is governed by the law of the place where it is situated.

The bill by its averments does not show affirmatively, that the debts of any of the complainants, except Prudhomme and Wollner, Hirshberg & Co., were existing at the time the mortgage was executed. The averment is, that of the debt owing Haralson & Co., “a large portion of the debt existed prior to the 18th February, 1880,” the day the mortgage was executed. The averment is too vague and uncertain. If it were confessed the court could not with safety decree, that as to any part these complainants were entitled to participate in the security of the mortgage.

The result is, the chancellor erred in not sustaining the demurrer, so far as it was directed to such parts of the bill as claimed relief in respect to the lands situate in Mississippi, and to the claim of relief by all the complainants, except Prudhomme and Wollner, Hirshberg & Co. In all other respects, the demurrer was properly overruled. The decree of the chancellor is consequently reversed, and the cause remanded for further proceedings in conformity to this opinion.



## Bragg v. The State.

*Indictment for using Abusive, Vulgar, or Insulting Language in or near a Dwelling, in Presence of Females.*

1. *Change of Domicil ; what constitutes.*—A domicil once acquired is presumed to continue until a new one has been gained *facto et animo*. An intention to remove, or steps taken preparatory to removal, is not a change of domicil.

2. *What is a dwelling within meaning of § 4203 of the Code.*—Where a husband had left the house which had been his dwelling, with no intention of returning, but he had not removed his household effects therefrom, and his wife had remained spending her days in the house, but her nights elsewhere, and was preparing to remove therefrom, it not being shown that the husband had acquired a dwelling elsewhere,—*held*, that the house was the dwelling of the husband within the meaning of section 4203 of the Code of 1876, punishing the use of abusive, insulting or vulgar language in or near a dwelling in the presence of a female or a member of the family.

APPEAL from Pike Circuit Court.

Tried before HON. JOHN P. HUBBARD.

The indictment in this case charges, in substance, that the defendant entered into the dwelling house of Robert Bryant, or upon the curtilage thereof, or upon the public highway near thereto, and in the presence of Jane Bryant, a female, made use of abusive, insulting or vulgar language. The evidence introduced on the trial tended to show the following facts: In the spring of 1880, Robert Bryant, with his family, moved on the lands of the defendant, and occupied as a dwelling a house on said lands, which was furnished him by the defendant, who had hired Bryant to work as a laborer on his farm during the balance of that year. On 3d September of that year Bryant “abandoned his contract with defendant and left the premises and never returned to the house again.” Bryant’s wife did not go with him, but after he left she did not remain in the house at night, and only went there in the day time, intending to leave the place and take away the furniture and other household goods which were in the house, and which constituted the only property owned by her and her husband. On 5th September, 1880, she procured a wagon and team and went to the house to remove the furniture and other things from the premises, and while engaged in loading the wagon with her husband’s effects, the defendant came to the house and objected to the removal and then used in her presence “the language im-

{Bragg v. The State.]

puted to him in the indictment." On this evidence, the venue having been proved, the court charged the jury, in substance, that notwithstanding Robert Bryant had left the house a few days before the use of the alleged language, and never returned thereto afterwards, yet, if his furniture and household goods remained in the house, and his wife went there in the day time, but did not stay there at night; and if on the day the alleged language was used, she went to the house for the purpose of removing the furniture and other household goods therefrom, the house was still the dwelling house of Robert Bryant within the meaning of the statute, although the wife intended to get the said effects and leave the house with them, and did not intend to return afterwards. To the giving of this charge the defendant excepted. He also reserved an exception to the refusal of the court to give, at his request in writing, a charge asserting the converse of the proposition embodied in the charge given by the court. The jury returned a verdict of guilty, on which the defendant was sentenced. The rulings of the court above noted are here assigned as error.

GRIFFIN & WOOD, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

STONE, J.—There can be no question that the house or dwelling mentioned in the evidence had been the dwelling house of Robert Bryant. And while it is shown that he had left the premises with no intention of returning, it is not shown that he had removed therefrom, or that it had ceased to be his dwelling. His wife was still there, spending her days in the house, and on the occasion when the alleged offense was committed, had a wagon there for the purpose of removing the household furniture from the dwelling. She and another female were present. An intention to remove, or steps taken preparatory to removal, is not a change of domicile. A domicile once acquired is presumed to continue until a new one has been gained *facto et animo*.—*Glover v. Glover*, 18 Ala. 367; *The State v. Hallett*, 8 Ala. 159.

The Circuit Court did not err in the charge given or in the charge refused.—Code, § 4203.

Affirmed.

[The State of Alabama, ex rel. Mobile County, v. Stone, Treasurer.]

## The State of Alabama, *ex rel.* Mobile County, v. Stone, Treasurer.

### *Petition for Mandamus by County against County Treasurer.*

1. *Fine and forfeiture fund of Mobile County; preferred claim against.* Under the provisions of the act of the General Assembly, entitled "An act to establish a Criminal Court in the county of Mobile," approved February 3d, 1846 (Pamph. Acts 1846, p. 29), money disbursed by said county in payment of the salary of the judge of said court, was a preferred claim against the fine and forfeiture fund of the county; and the priority thus given to the claim was not abrogated by subsequent legislation changing the name of the court to "The City Court of Mobile," and increasing the salary of the judge thereof.

2. *Fine and forfeiture fund; by whom controlled.*—The Commissioners Court has no control over fines and forfeitures; but the fund accruing therefrom is in the custody of the treasurer, and is subject to his continued custody until paid out by him pursuant to law.

3. *Mandamus; when it can be invoked.*—The county of Mobile having a preferred claim against its fine and forfeiture fund for moneys disbursed by it in paying the salary of the judge of the City Court of Mobile, has a clear legal right to have any balance in the hands of the treasurer belonging to that fund, not exceeding the amount so paid out by it, transferred from the account of that fund to the account of the general fund of the county; and upon the refusal of the treasurer to make the transfer, the county may compel him to do so by *mandamus*, the county having no other remedy for the enforcement of its right.

### APPEAL from Mobile Circuit Court.

The name of the presiding judge is not disclosed by the record.

This was a petition by Mobile County for a writ of *mandamus* against S. Graham Stone, the treasurer thereof, to compel him to transfer from the account of the fine and forfeiture fund to that of the general fund of the county, certain moneys in his hands belonging to the fine and forfeiture fund, to reimburse the county in part for the salary of the judge of the City Court of Mobile, which the county had paid, and which, it claimed, was a preferred claim against said fund under the act establishing the court. The provisions of the act under which the preference is claimed, are sufficiently stated in the opinion. After stating these provisions and the fact that the treasurer then had in his hands a specified sum of money belonging to said fund, the petition avers, that under a resolution and order of the board of revenue and road commissioners, the county had presented its claim to the treasurer and had demanded that he pay said money into the county treasury in such manner as to



[The State of Alabama, ex rel. Mobile County, v. Stone, Treasurer.]

be subject to the order and control of the county, and he had refused to do so on the ground that other claims had been previously filed, numbered and registered against said fund, which were still unpaid. On the hearing of the petition, the court refused the prayer thereof; and this ruling is here assigned as error.

WM. G. JONES, for appellant.—Mobile county is entitled to have the amount paid by it for the salary of the judge of the City Court of Mobile reimbursed to it out of the fine and forfeiture fund in preference to any other claim against that fund. Acts of 1846, p. 29; Acts of 1849–50, p. 36, and *Ib.* p. 88. The fine and forfeiture fund is a special fund held by the county treasurer, and subject exclusively to his control according to law.—*Palmer v. Fitts*, 51 Ala. 489; *Briggs v. Coleman*, 51 Ala. 561. Any individual who has a claim against said fund, on the refusal of the treasurer to pay it, has a clear, adequate and sufficient remedy at law; but the county has not. This is, therefore, a proper case for *mandamus*.—2 Bick. Dig. 240, 241, 242, 243; 63 Ala. 559; 64 Ala. 159; 61 Ala. 318.

No counsel for appellee.

SOMERVILLE, J.—The claim of the county of Mobile, sought to be enforced by the writ of *mandamus* in this case, is very plainly a *preferred claim* as against the fine and forfeiture fund in the hands of the appellee, who is treasurer of the county. This priority was secured by the act of February 3d, 1846, entitled “An act to establish a Criminal Court in the City of Mobile.”—Acts 1846, pp. 29–30. Section 9 of this act provides that the salary of the judge of this court shall be paid by the county, and “for the *remuneration* of said county for the payment of the same, the *finer and forfeitures of all State cases* in Mobile county, to the full amount of said salary, shall be *paid into said treasury, in preference to any other appropriation of the same.*”

Subsequently the name of the court was changed to “The City Court of Mobile,” by the act of February 12th, 1850, which operated as a change of name only, and not of legal identity, jurisdiction, powers or authority.—Acts 1850, p. 88. The salary of the judge was also increased, but was made “payable at like time and from the same sources” as before provided by law.—Acts 1850, p. 36, § 44. We find no legislation repealing the original act authorizing the county to be reimbursed out of the fine and forfeiture fund for the amount of this officer’s salary, or in any manner abrogating the priority secured to this claim by the act of February 3, 1846.

[The State of Alabama, *ex rel.* Mobile County, v. Stone, Treasurer.]

We have no doubt that *mandamus* is the proper and only remedy of petitioner in this case. The relator shows a clear legal right, and has no other adequate remedy to enforce it, and this is the sole test of cases where the writ can properly be invoked.—*Ex parte S. & N. R. R. Co*, 65 Ala. 499; High on Extr. Rem. § 10; *Murphy v. State, ex rel.*, 59 Ala. 639.

The commissioners courts have no control over fines and forfeitures. The fund accruing from these sources is in the custody of the treasurer of the county, and is subject to his continued custody until paid out pursuant to law. And the General Assembly can by legislative enactment charge it with such priorities or preferences as their option may suggest.—*Palmer v. Fitts*, 51 Ala. 489.

A suit at law here for the money claimed by the county would clearly not lie. As the treasurer is entitled to hold and retain all moneys of the county, he would be entitled to hold this fund, and his custody of it could not be interrupted by suit, so long as he honestly held it, during the term of his office, and without any wrongful or tortious dealing with it. His duty under the statute is expressly declared to be, “to *receive and keep* the money of his county, and disburse the same according to law.”—Code, 1876, § 845; *Edmondson v. DeKalb County*, 51 Ala. 103. The function of the writ of *mandamus*, as here resorted to, is not to invade or interrupt his lawful custody of the fund in question. It is, in effect, only to compel the treasurer to *transfer the proper amount from one account to another*, he still retaining his lawful possession—to transfer the amount claimed, in other words, from the special fund, accrued from fines and forfeitures, to the moneys in the general treasury of the county, which are subject to disbursements of a character entirely different. The petitioner showed a clear legal right to have this done, and the writ of *mandamus*, we think, was the appropriate remedy to compel the performance of the ministerial duty of doing it.

The Circuit Court erred in dismissing relator's petition, and its judgment is reversed, and a judgment is rendered by this court, granting the prayer of the petition, and awarding the writ of *mandamus*.

[Weis v. Levy.]

## Weis v. Levy.

### *Contest of Claim of Exemption.*

1. *Debtor's exemption of personal property.*—It is the right of every debtor, resident of this State, under the constitution and the statute enacted for the purpose of giving full effect thereto, to have and to hold, at all times, an exemption of personal property of the value of one thousand dollars, to be selected by him from the property which he may then own, free from liability to the payment of his debts.

2. *Double exemption not allowable.*—A debtor can not have, however, more than one such exemption at the same time; and when such exemption has once been claimed, the property selected by the debtor and allotted to him, so long as he retains it, and it is undiminished in value, he is not entitled to a further exemption.

3. *When debtor can claim further exemption.*—When the personal property which a resident debtor had selected as exempt, has been taken from him by judicial process, or has been otherwise lost to him, or has deteriorated in value, without fault on his part, or has been consumed in the maintenance of himself or family, or has been applied by him to the payment of his debts, such debtor has the right, in lieu thereof, to select and retain other property as exempt to him, notwithstanding the former claim of exemption.

4. *Fraudulent disposition of exempt property; its effect on subsequent claim of exemption.*—It seems, that if the debtor were to fraudulently dispose of the property he had claimed and retained as exempt, with the view, and for the purpose of obtaining an additional exemption, his claim to such additional exemption would be disallowed.

5. *Transcript; when seal of court thereto not required.*—A certified transcript of an exemption claim made and filed in the office of the probate judge, is admissible in evidence, although the certificate thereto is not under the seal of the court.

### APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

This was a contest of a claim of exemption lodged by Theodore Weis with the sheriff of Monroe county, whereby he claimed as exempt to him from levy and sale certain personal property on which said sheriff had levied an attachment issued out of the Circuit Court of Mobile county, on 27th December, 1878, at the suit of M. P. Levy & Co., and against the said Weis. The property claimed as exempt is particularly described in the claim, and amounted in value to the sum of \$327.90. The cause was tried in the court below on an issue made up under the statute between Levy & Co., as plaintiffs, and Weis as defendant. On the trial, as shown by the bill of exceptions, the plaintiffs read in evidence a certified transcript "from the the records of the Probate Court of Escambia



[Weis v. Levy.]

county, of an exemption claim made and filed for record by the defendant Weis," the certificate to which was made by the judge of the court, but was not under the seal of the court. When the transcript was offered in evidence, the defendant objected thereto, on the ground, among others, that it was not certified under the seal of said court. The court overruled the objection, and the defendant excepted. The claim of exemption copied in the transcript shows that it was sworn to by defendant on 27th December, 1878, at which time defendant was a "resident citizen" of the county of Escambia, and that he thereby claimed as exempt to him from levy and sale under judicial process, personal property therein described amounting in value to \$1,000. The evidence also tended to show that the personal property described in said claim was in fact selected by, and set apart to the defendant, about 27th December, 1878, out of a stock of goods, on which the sheriff of Escambia county had levied an attachment in favor of another creditor. The defendant was then examined as a witness on his own behalf, and the following questions were propounded to him: 1. Whether or not the said goods which were so claimed and set apart to him were afterwards seized and taken from him by the sheriff of Escambia county, who claimed to act under a writ of attachment other than that sued out by plaintiffs, and if so, whether he had ever received back said goods or their proceeds or value. 2. Whether or not he had, before he made the claim of exemption now contested, disposed of any of said goods and property in payment of his debts. 3. Whether or not, at the time he made the claim of exemption now contested, he still owned, had or possessed all of the said goods which were originally set apart to him. 4. At the time he made the claim of exemption now contested, what had become of the said goods originally claimed by and set apart to him. To each of these questions the plaintiffs objected on the ground that it was immaterial, and their objections were sustained and the defendant separately excepted.

The Circuit Court charged the jury, on the request of the plaintiffs in writing, that if they believed the evidence they must find the issue in their favor, and the defendant excepted. The jury returned a verdict for the plaintiffs, and a judgment was rendered thereon condemning the property claimed to sale under the attachment, and from this judgment the defendant appealed. The assignments of error, among others, are the several rulings of the court on the evidence and the giving of the charge asked by the plaintiffs.

C. J. TORREY, for appellant.

VOL. LXIX.

[Weis v. Levy.]

OVERALL & BESTOR, *contra*.

(No briefs came to hands of the reporter.)

BRICKELL, C. J.—The point of contention in the Circuit Court seems to have been whether the right of the appellant to an exemption of personal property, was not exhausted by a former claim and allotment to him, when a prior attachment in favor of Lyons & Co. was levied in Escambia county or whether the fact that a part of the property then claimed, had been taken from him by judicial process, entitled him to an exemption of other property, so that he would have one thousand dollars worth of personal property of his own selection, which he could retain free from liability to his debts. It is the right of every debtor, secured by the constitution and by the statute enacted for the purpose of giving full effect to the constitutional provision, to select from all the personal property he may own, any part thereof, not exceeding one thousand dollars in value, and to hold and retain it, exempt from levy and sale under judicial process for the payment of debts. It is a simple exemption of personal property of the value of one thousand dollars, selected by the debtor, the statute and constitution contemplate. At the same time he can not have more than one such exemption, as at the same time he can not have more than one homestead. When the exemption has once been claimed, the property selected by the debtor, and allotted to him, so long as he retains it, and it is undiminished in value, he is without right to a further exemption; otherwise double exemptions could be claimed and the whole of his property exhausted, to the prejudice of his creditors. But if the property allotted to him has been taken from him without fault on his part, or it has been consumed in maintaining himself or family, a subsequent exemption may be claimed. It is his right to have and hold, at all times, an exemption of personal property of the value of one thousand dollars, of his own selection, free from liability to debts. When the property which he had selected has been lost to him, or has deteriorated in value, without fault on his part, or has been consumed in the maintenance of himself or family, or applied by him to the payment of debts, the right secured to him would be impaired, if he could not select and retain property, notwithstanding the former claim of exemption. The rights of creditors are not impaired, so long as the debtor is not permitted to hold property exceeding in value one thousand dollars.—*Ala. Conference v. Vaughan*, 54 Ala. 443.

If he were to dispose of fraudulently the property he had claimed and retained, with the view, and for the purpose of

[The State of Alabama v. Conner.]

obtaining an additional exemption, perhaps his claim would be disallowed.

In the rejection of the evidence offered tending to show that a part of the property formerly claimed and allotted to the appellant, had been taken from him by judicial process, and that at the time he interposed the present claim, such of that property as remained in his possession did not exceed in value one thousand dollars, the Circuit Court erred.

The other questions presented by the record are not of importance, and may not arise again in the progress of the cause. It is not necessary to consider them specially. The transcript from the court of probate of the declaration of exemption filed by the appellant, was properly admitted.—*Beggs v. State*, 55 Ala. 108; *Bishop v. State*, 30 Ala. 34.

For the error noticed, the judgment is reversed and the cause remanded.

## The State of Alabama v. Conner.

### *Statutory Real Action in Nature of Ejectment.*

1. *Possession by mortgagor or his alienee against mortgagee; when not adverse.*—As the mortgagor does not hold adversely, but in subordination to the title of the mortgagee, the presumption is that an alienee of the mortgagor holds in the same right, and asserts no higher, or independent title. If, therefore, such transaction be left to its own legal intendment, the presumption is, that the alienee, like his vendor, holds in recognition of, and subordination to the prior and paramount title of the mortgagee.

2. *Same; when it becomes adverse.*—To convert such possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and such renunciation or disclaimer must be traced to his knowledge.

3. *Vendor and vendee; character of vendee's possession under bond for title.*—The rule is different, however, when lands are sold, or contracted to be sold, by executory agreement, and no title is made to the purchaser. In such case, if the purchaser be in possession, he holds, and can hold only as a tenant at sufferance to the vendor, and may be evicted at his will and pleasure.

4. *Same; possession of vendee independent and adverse.*—One who acquires possession under a conveyance from an executory purchaser, in fact acquires no title whatever, but takes the possession under title simply colorable. Such possession, however, not being in subordination to the true title, but in disregard of it, is independent and adverse, and, if permitted to continue for ten years, will ripen into a title which will defeat or maintain an action of ejectment.

5. *Bona fide purchaser without notice; what necessary to constitute.*—To maintain the defense of a *bona fide* purchase without notice, the purchaser must not only show a conveyance to himself, but he must go further, and prove that his grantor was seized of a legal title, superior to that shown



[The State of Alabama v. Conner.]

by the plaintiff; and he is charged with notice of every defect, which an examination of his vendor's chain of title would disclose.

6. *Adverse possession; defense of not dependent on a bona fide purchase.* The defense of adverse possession does not depend on sufficiency of title. It does not rest on any documentary title whatever, but impliedly concedes that the possession had its inception, not in right, but in wrong.

7. *Same.*—The gist of such defense is, that the defendant and those under whom he claims, have held continuous adverse, or independent possession for ten years next before the suit was brought.

APPEAL from Washington Circuit Court.

Tried before Hon. H. T. TOULMIN.

This was a statutory real action in the nature of ejectment; was brought by the State, for the use of township eighteen, range three, west, against Mrs. Martha E. Conner, for the recovery of a quarter section of land situated in section sixteen of said township and range, and was commenced on the 13th of September, 1880. The defendant pleaded (1) not guilty, and (2) "in short by consent, that she has been in the quiet, peaceable, and open, adverse possession of the land sued for, for more than ten years prior to the commencement of this action, and before the 30th of November, 1876, under *bona fide* claim and color of title, by deeds of conveyance from Thos. L. Whitsett, E. S. Dargan, James White, and the school commissioners of said township eight, mentioned in said complaint." A demurrer to the second plea having been overruled by the court, the plaintiff joined issue on the first plea, and replied to the second, in substance, (1), that the defendant set up adverse possession under claim of title from school commissioners, and that the purchase-money therefor has never been paid; (2), that neither the defendant nor those under whom she claims ever gave to the plaintiff notice of claim of title adverse to plaintiff, and that the purchase-money for said land has not been paid; and (3), that the plaintiff sued on the notes given for the purchase-money of the said land, and the recovery in that suit was defeated "by the plea of the statute of limitations and the verdict and judgment in defendant's favor in that suit, by which defendant avoided the contract of sale for the purchase-money of said lands." To these several replications the defendant interposed demurrers, which were sustained by the court, and the cause was then tried on issue joined upon the plea of not guilty, and the trial resulted in a verdict and judgment for the defendant.

The evidence introduced on the trial showed, that on the 27th of December, 1859, the plaintiff, having the title to, and possession of the land sued for, sold it to James White, and took his notes, with sureties thereon, for the purchase-money, and entered into a written agreement with him, that no title was to pass until the purchase-money was paid; that no deed was in fact

[The State of Alabama v. Conner.]

executed to him; that plaintiff instituted suit on said notes, but a recovery was defeated "by the plea of the statute of limitations," and that defendant was in possession of said land at the time this suit was commenced. The value of the rents was also shown. The defendant then read in evidence, (1) a deed executed by James White to Roxana Dargan, dated July 20th, 1863, (2) a deed executed by Roxana Dargan and E. L. Dargan to T. L. Whitsett, dated December 31st, 1866, and (3) a deed executed by T. L. Whitsett to H. W. Conner, dated January 23d, 1867. Each of these deeds was duly acknowledged and recorded, and contained covenants of warranty. To the introduction of each of these deeds the plaintiff objected on the ground that the defendant had failed to prove that the original purchase-money had been paid to plaintiff. The court overruled the objection, and plaintiff excepted. The defendant also proved, against the plaintiff's objection, the payment by H. W. Conner of the purchase-money for the lands to Whitsett under his purchase; that W. H. Conner was dead; that defendant was his widow and claimed under him, and that she and those under whom she claims "have been in possession of the land sued for openly and notoriously, paying taxes on it, and exercising acts of ownership over it, as her own land, against the claims of all persons, ever since the dates of the above mentioned deeds, and such claim has been, and is made under said deeds of purchase aforesaid." This being substantially all the evidence introduced on the trial, the plaintiff asked the court in writing to charge the jury as follows: 1. "If the evidence in this case shows to the jury that this action is brought for the recovery of sixteenth section school lands belonging to the township, then the plea of the statute of limitation of ten years does not apply in this case." 2. "If the possession of the defendant is claimed to be held under the deeds in evidence, and under certificate of the commissioners of the township in which the lands sued for lie, the possession is not adverse to plaintiff until the purchase-money due the plaintiff has been paid to plaintiff." 3. "If the party who bought the land sued for from the township trustees, as part of the sixteenth section lands of said township, and under whom defendant claims, defeated a recovery, when sued on the notes for the purchase-money, on any other grounds than that of payment, then the defendant thereby avoided the contract of sale, and the title reverted to the State, and the verdict should be for the plaintiff." The court refused these charges, and the plaintiff duly excepted.

The rulings of the Circuit Court above noted are here assigned as error.

[The State of Alabama v. Conner.]

appellant.—(1). The demurrer to the second plea should have been sustained. This court is bound judicially to know, that the legal title to the land was vested in the State, and that the school commissioners could not have legally made any deed, even if the purchase-money had been paid.—*Brown v. Lang*, 4 Ala. 50. But the plea was wholly insufficient, because it did not set forth the facts, but merely legal conclusions. It shows that the purchaser from the school commissioners held in subordination to the State, and to show an adverse possession sufficient to cause the statute of limitations to commence running, the plea should have set forth facts, showing that the allegiance arising from the subordinate relation had been repudiated, and notice brought home to the holder of the legal title. (2). The holder of a bond for titles can not hold adversely to the seller, until the purchase-money is paid (*Ivey v. McQueen*, 36 Ala. 308); or until he throws off the allegiance due to the seller, and brings notice home to him.—*Coyle v. Wilkins*, 57 Ala. 108. The buyer of sixteenth section lands stands in a less favorable attitude to the township than a mortgagor does to the mortgagee. No title whatever vests in the purchaser of sixteenth section lands until the payment of the purchase-money.—Code of 1876, §§ 987–9. (3). Whoever buys land from one in possession holding under a bond for titles, or under other instrument showing subordination to another, is bound to take notice of the rights of the holder of the legal title.—*Bradford v. Harper*, 25 Ala. 337; 2 Brick. Dig. p. 520, § 184. Such was the relation of White, and through him and the intermediate holders, of Mrs. Conner. (4). *Miller v. The State*, 38 Ala. 600, is not inconsistent with this position, in view of the difference in the facts. Possession does not become adverse to the title of the paramount owner until the possessor repudiates his relation of subordination, accompanied by open, notorious, hostile possession, and brings notice home to the holder of the paramount title, of such repudiation and hostile possession.—*Wilkins v. Coyles*, *supra*; *Boyd v. Beck*, 29 Ala. 703; *Byrd v. McDaniel*, 33 Ala. 18; *Herbert v. Hanrick*, 16 Ala. 581; *Shorter v. Smith*, 56 Ala. 210; *Ormond v. Martin*, 37 Ala. 598; Angel on Lim. § 384; *Harrison v. Pool*, 16 Ala. 167; *Benje v. Creagh*, 21 Ala. 151; *Knight v. Bell*, 22 Ala. 198.

L. H. FAITH, *contra*. (No brief came to the hands of the reporter.)

STONE, J.—When a mortgagor, after the execution of the mortgage, makes sale of the mortgaged premises to a third person, who has notice, actual or constructive, of the prior mortgage, the presumption is that he sells only the interest remain-



[The State of Alabama v. Conner.]

ing in him, which is an equity of redemption. And, as the mortgagor does not hold adversely, but in subordination to the title of the mortgagee, the presumption is that the alienee of the mortgagor holds in the same right, and asserts no higher, or independent title. So, if such transaction be left to its own legal intendments, the presumption is that the alienee, like his vendor, holds in recognition of, and subordination to the prior and paramount title of the mortgagee. This, without more, is not an adverse holding, which will ripen into a title at the end of ten years of continued occupation. To convert such possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and that renunciation must be traced to his knowledge. Till that is done, such possession is not regarded as adverse.—*Foster v. Goree*, 5 Ala. 424; *Herbert v. Hanrick*, 16 Ala. 581; *Boyd v. Beek*, 29 Ala. 703; *Byrd v. McDaniel*, 33 Ala. 18; *Coyle v. Wilkins*, 57 Ala. 108.

The rule of decision is different, however, when lands are sold, or contracted to be sold, by executory agreement, and no title is made to the purchaser. In such case, if the purchaser be in possession, he holds, and can hold only as a tenant at sufferance to the vendor, and may be evicted at his will and pleasure.

The two titles or claims, noticed above, are in many respects dissimilar. Each claimant, it is true, is in some respects the owner of a mere equitable claim, but the equities are of different characters. The mortgagor's equity consists in the right to redeem; but when the mortgage debt is paid, and satisfaction entered on the record of the mortgage, the legal title, without any re-conveyance, re-vests *eo instanti* in the mortgagor. So, if the mortgagor sell and convey the premises by deed with covenants of warranty, express or implied, and afterwards pay the mortgage debt, and have satisfaction entered of record, the legal title would by that very act, without re-conveyance, vest in his grantee.—*Abraham v. Chapman*, 61 Ala. 108. In fact, as to all the world except the mortgagee, the mortgagor is treated as the owner of the lands.—*Jones on Mortgages*, § 11. So, the mortgagor has a valuable interest in the land, which he can sell and convey. With a purchaser, holding an obligation to make title, say, when the purchase-money is paid, the status of the title is entirely different. He is not the legal owner as against any one, and strictly has no title, legal or equitable, which he can sell and convey. He has an obligation for title when certain conditions are performed; and when he does fulfil those conditions, he will have an equity; but not an equity which will become a legal title, when the condition is performed. Never having had title, it requires a conveyance or its equivalent to vest a title in him. True, while the agreement remains

[The State of Alabama v. Conner.]

executory, he may transfer his rights under the contract, by assigning the obligation to make title. And a conveyance of the land by such purchaser, although inoperative as a conveyance of title, would, in equity, transfer to the grantee the same equitable rights, as an assignment of the title bond would convey; a right to perform the condition precedent, and thus perfect an equitable claim to demand a title. But, as a transfer of title, a conveyance made by such executory purchaser would vest no title in the grantee, for the obvious reason that such grantor would have no title to convey. A bond to make title not only fails to convey title, but it confers no power to acquire a title by any process known to legal forums. The only redress law courts can administer in such cases, is to award pecuniary damages for the breach of the condition of the bond.

The effect of these ascertained principles is, that one who acquires possession under a conveyance from an executory purchaser takes it under title simply colorable, and, in fact, acquires no title whatever. Such holding, not being in subordination to the true title, but in disregard of it, we have held that it is independent and adverse; and if permitted to continue ten years, it ripens into a title which will defeat or maintain an action of ejectment.—*Miller v. The State*, 38 Ala. 600; *Taylor v. Dugger*, 66 Ala. 444.

There is a line of decisions invoked in this case, which rest on impregnable grounds, but relate to an entirely different principle. We refer to the defense of *bona fide* purchase without notice. It is very true, if Mrs. Conner's defense rested on that ground, she has entirely failed to make it good. To maintain such defense, the purchaser must not only show a conveyance to himself, but he must go farther and prove that his grantor was seized of a legal title, superior to that shown by plaintiff. And he is charged with notice of every defect, which an examination of his vendor's chain of title would disclose. If, as is claimed in this case, title never passed out of the State to White, the first purchaser, an examination of Whitsett's chain of title would have disclosed the absence of this first, and most important link in the chain. This would have invalidated her title, and would have been fatal to her plea of *bona fide* purchase.—*Bradford v. Harper*, 25 Ala. 337; 2 Brick. Dig. 520, § 184; *Coyle v. Wilkins*, *supra*. But the defense does not rest on a *bona fide* purchase without notice. If it did, and were made out, the defendant would not require the aid of the statute of limitations. That defense does not depend nor rely on original sufficiency of title. It relies on no documentary title whatever, and impliedly concedes that the possession had its inception not in right, but in wrong. The gist of it is, that the defendant and those under whom he claims, have held

[Holcombe v. The State.]

continuous adverse, or independent possession for ten years next before the suit was brought.—*Collins v. Johnson*, 57 Ala. 304.

The Circuit Court did not err in refusing the charges asked.

Affirmed.

## Holcombe v. The State.

### *Indictment for Petit Larceny.*

1. *When parties tenants in common.*—A contract between two parties farming together, by the terms of which one was to furnish the lands and stock and the other the labor, to make the crop, and the crop, when made, was to be divided between them, constituted the parties thereto tenants in common of the crops raised by them under the contract.

2. *Sections 3474 and 3475 of the Code construed.*—Sections 3474 and 3475 of the Code did not totally abrogate or abolish the relation of tenants in common in the cases coming within their influence, but only modified it so as to give to each tenant in common a lien on the share of the other in the crops jointly raised, with the remedy of enforcing it by attachment. *Collier & Son v. Faulk & Martin*, ante, 58, referred to and re-affirmed on this point.

3. *Larceny; at common law, tenant in common can not be guilty of, as to joint property.*—At common law a joint owner or tenant in common of personal property, can not be guilty of larceny, by taking or appropriating to his own use the whole or any part of the joint property, however fraudulent or felonious in fact may be his intent, unless he take it from the custody of a bailee with intent to charge the latter with a pecuniary liability.

4. *Section 4355 of the Code construed.*—Under an indictment for larceny a tenant in common can not be convicted of the offense of having fraudulently converted to his own use the undivided interest of his co-tenant, although, under the provisions of § 4355 of the Code, one guilty of such an offense is punishable as if he had stolen the property so converted.

### APPEAL from Russell Circuit Court.

Tried before Hon. H. D. CLAYTON.

At the fall term, 1881, of said court, the appellant was indicted for the larceny of "six hundred and seventy-five pounds of seed cotton, of the value of twenty dollars, the personal property of John D. McMakin;" and at the same term he was tried and convicted therefor. On the trial the evidence showed, that the cotton alleged to have been stolen, was raised during the year, 1881, by the appellant, McMakin and one Gwinn, under a contract between them, by the terms of which they were to farm together during that year, McMakin was to furnish the land and stock and the appellant and Gwinn were to furnish



[Holcombe v. The State.]

the labor to make the crop, and of the crop raised McMakin was to have one-half, and the appellant and Gwinn were to have the other half. The evidence also tended to show that the appellant took and carried away the cotton from the joint or common possession of the parties to said contract, and with a felonious intent,—“the only question before the court and proposed to be raised,” as recited in the bill of exceptions, “being, whether considering the relation the defendant bore to the title to the cotton, he could commit larceny by wrongfully taking it.” The appellant asked the court in writing to charge the jury that if they believed the evidence they must find him not guilty, which charge the court refused to give, and he excepted; and, upon conviction, appealed to this court.

L. W. MARTIN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—At common law, a joint owner, or tenant in common of personal property can not be guilty of larceny, by taking or appropriating to his own use the whole or any part of the joint property, however fraudulent or felonious in fact may be his intent, unless he take it from the custody of a bailee, with intent to charge the latter with a pecuniary liability.—*Kirksey v. Fike*, 29 Ala. 206; 2 Bish. Cr. Law, § 792; Clark's Man. Cr. Law, § 955.

The defendant, under the contract made between himself and McMakin, was a tenant in common of the crops jointly raised by them. The agreement to farm on shares and divide the crops constituted this relation, notwithstanding the fact that McMakin was to furnish the land and teams, and the defendant, Holcombe, only the labor. This was the conclusion reached by us in *Collier & Son v. Faulk & Martin*, ante, 58. We then held that the effect of sections 3474 and 3475 of the Code was not to totally abrogate or abolish the relation of tenants in common in the cases coming within their influence, but only to modify it so as to give to each tenant in common a lien on the share of the other in the crops jointly raised, with the remedy of enforcing it by attachment. “For this purpose and to this extent,” as we said in the above case, “the relation of landlord and tenant, with all its incidents and rights in the one case, and the contract of hire, with the relation of employer and employee in the other, are declared respectively to exist. When this protection is secured, the function of the statute is fulfilled, and the legislative purpose accomplished. The rights and rela-

[Berney v. The State.]

tions of the contracting parties must be construed to remain as fixed by themselves, and are not intended to be abrogated or destroyed to any greater extent than is required to carry out the legislative intent."

The court erred in refusing to give the charge requested by the defendant, viz: that the jury should acquit him of the offense of larceny, for which he stood indicted, if they believed the evidence.

It is true that one tenant in common who fraudulently converts to his own use the undivided interest of his co-tenant, is punishable as if he had stolen it, under the provisions of section 4355 of the Code, but the indictment in the present case is not framed under that section.

The judgment of the Circuit Court is reversed and the cause remanded. In the meanwhile let the defendant be retained in custody until discharged by due course of law.

## Berney v. The State.

### *Indictment for Carrying Concealed Pistol.*

1. *Declarations by accused; when inadmissible for him.*—The connection between an act *prima facie* criminal and a fact or circumstance which may excuse it, can not be shown by the declarations of the accused made prior to, and in contemplation of the act.

2. *Same.*—An offer on the part of a defendant, indicted for carrying a pistol concealed about his person, made several days before he was detected in the act, and on being informed that threats of violence had been made against him, to borrow five dollars with which to purchase a pistol, being a declaration by the accused self-serving in its character, and capable of concoction as a part of a scheme of crime, is not admissible for him.

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

At the February Term, 1881, of said court, the defendant was indicted for carrying a pistol concealed about his person. The evidence introduced on behalf of the State tended to show that the defendant, on or about the 4th day of November, 1880, did carry a pistol concealed about his person. The defendant then introduced testimony tending to show, that one Ben Turner, in the latter part of October, 1880, heard one Jesse Chilton say, that he was armed and that defendant had better get ready for him, as he intended to meet him, and that Turner immediately thereafter told the defendant what Chilton had said. The

[Madden v. Floyd.]

defendant then offered to prove that he, "immediately upon receiving said information, asked his employer to let him have five dollars for the purpose, as he said, of buying a pistol; but, on objection made by the State, the defendant was not allowed by the court to make such proof, and to this ruling the defendant excepted, and here assigns the same as error.

JNO. GINDRAT WINTER, for appellant cited 1 Vol. Brick. Dig. p. 843, §§ 553, 555; *Hooper v. Edwards*, 20 Ala. 528; *Shorter v. The State*, 63 Ala. 129; *Tompkins v. Reynolds*, 17 Ala. 109; *Gandy v. Humphries*, 35 Ala. 617; *Wesley v. The State*, 52 Ala. 182.

H. C. TOMPKINS, Attorney-General for the State, with whom was F. S. FERGUSON, Solicitor for 2d Judicial Circuit. (No brief on file.)

BRICKELL, C. J.—The offer of the accused, on being informed of the threats of violence Chilton had made, to borrow five dollars to purchase a pistol, was made several days before he was detected carrying a pistol concealed. If the fact of the offer was admissible as evidence, it would be admissible for no other purpose than to connect the act of carrying the pistol with the communicated threat—to show that the act was caused by the threat. The connection between an act *prima facie* criminal, and a fact or circumstance which may excuse it, can not be shown by the declarations of the party accused made prior to, and in contemplation of the act. Such declarations are self-serving, are capable of concoction as part of a scheme of crime, and are not admissible as evidence for the party making them.—Whart. Crim. Ev. § 263.

Let the judgment be affirmed.

## Madden v. Floyd.

### *Bill in Equity to Foreclose Mortgage.*

1. *Decree pro confesso no bar to motion to dismiss bill for want of equity.* Under the statute and rules of practice (Code of 1876, § 3826; Rule Ch. Pr. 76), a decree *pro confesso* against a defendant will not preclude him from moving to dismiss the bill for want of equity.

2. *Mortgage; when description of mortgagor sufficient.*—The description of the grantor in a mortgage of real estate is sufficiently certain, if his



[Madden v. Floyd.]

identity can be worked out through a proper application of the maxim, *Id certum est quod certum reddi potest*.

3. *Same*.—A mortgage of real estate is not void for uncertainty in the description of the mortgagor, which is signed by three persons, no one of whose names appears therein except at the place of signing, otherwise than under the general designation of the pronouns "I," "my" and "me," when the note secured thereby is particularly described in the mortgage, and it is manifest, on construing the note and mortgage together, who the person is that was intended to be described in the mortgage as the maker thereof.

4. *Statute of frauds; what case not affected thereby*.—The statute of frauds has no application whatever to a case where the surety having paid the debt of his principal, seeks reimbursement by the foreclosure of a mortgage executed to him by the principal to indemnify him against loss resulting from his suretyship.

5. *Decree pro confesso; when taken too soon*.—A defendant having thirty entire days within which to answer or plead to a bill in equity after service of the summons, a decree *pro confesso* rendered on the thirtieth day, is taken one day too soon and is erroneous.

6. *What not a ground of assignment of error on appeal from interlocutory decree*.—The irregular and erroneous rendition of a decree *pro confesso* can not be assigned as error on an appeal taken by a defendant, under the statute, from an interlocutory decree of the chancery court, overruling a motion to dismiss the bill for want of equity.

#### APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

Mrs. A. A. Madden, a *feme sole*, one of the appellants, being indebted to one John R. Scott, executed to him her promissory note with John W. Floyd, the appellee, as her surety, for the amount of such indebtedness; and afterwards she executed and delivered to the appellee a mortgage on real estate situate in Lee county, to indemnify and hold him harmless from any loss which he might sustain by reason of his suretyship. Mrs. Madden failed to pay the note at its maturity, and thereupon the appellee paid it; and he afterwards filed the bill in this cause to foreclose the mortgage executed to him by her as above stated. The mortgage was also signed by two daughters of Mrs. Madden, one of whom had died, and the other had married before the filing of the bill. Mrs. Madden and her married daughter and the husband of the latter are made parties defendant to the bill, and it is averred, that the deceased daughter had no interest in the lands conveyed by the mortgage at the time of its execution. The note and mortgage are made exhibits to the bill. The granting clause of the mortgage is in these words: "Know all men by these presents, that whereas John W. Floyd did on the 17th day of October, 1875, join with me in executing a promissory note for the sum of eight hundred and twenty-five dollars, payable to John R. Scott or bearer, on or before the 15th day of November, 1876, and dated the 17th day of October, 1875; and whereas, the said John W. Floyd in executing said note with me did so as my security for

[Madden v. Floyd.]

the payment of said sum of money, he deriving no benefit whatever, or consideration from said payee of said note: Now, in view of the premises, and to hold the said John W. Floyd harmless and to indemnify and secure him from any loss, should he, by virtue of his having become *my* security on said note, have to pay any part of, or all of said note after the same becomes due, and for the further consideration of one hundred dollars to *me* in hand paid, the receipt whereof is hereby acknowledged, *I* have this day, and do by these presents grant, bargain, sell and convey unto the said John W. Floyd," etc. The attesting clause of the mortgage is in these words: "In witness whereof *I* have set *my* hand and seal this 4th day of April, 1876." The name of neither party signing the mortgage appears at any place therein except at the place of signing; nor is there any other reference to the grantors therein than under the general designation of the pronouns "I," "my" and "me." Decrees *pro confesso* were taken against the defendants on the thirtieth day after service, they having failed to answer. Subsequently they made a motion before the register to set aside the decrees *pro confesso* rendered against them, on the ground that they were entered too soon, but this motion was refused by the register, and they appealed to the chancellor. The cause was submitted on that appeal and also on a motion to dismiss the bill for want of equity; and the chancellor entered a decree sustaining the register, and overruling the defendants' motion to dismiss.

These rulings are assigned as error.

J. W. CHILTON, for appellants.—(1). The mortgage does not mention the name of any grantor, nor does it describe the *person* of any of the defendants so that the grantor's identity might be established under the maxim, *Id certum est*, etc. The transaction recited in the mortgage does not describe the *person* of the grantor, and it might be as applicable to one of the signers of the mortgage as to the other. It has been frequently decided, that when the name of one person occurs in the deed as grantor, but the instrument is signed by *two*, the instrument is not the deed of the person not named as grantee.—*Harrison v. Simons*, 55 Ala. 514; *Hammond v. Thompson*, 56 Ala. 589; *Jones v. Morris*, 61 Ala. 518; *Peabody v. Hewett*, 52 Me. 50; *Agricultural Bank v. Rice*, 4 How. (U. S.) 225, 7 B. Mon. 545. See also 3 Wash. Real Prop. p. 263. It is, therefore, insisted that the mortgage is void. (2). The bill alleges, in substance, that Mrs. Madden being indebted to Scott (*past due*), she procured complainant to sign a note with her as her surety. It expressly states, "there was no consideration passing to or received by complainant." Under this state of facts Scott

[Madden v. Floyd.]

could not have recovered against Floyd.—*Jackson v. Jackson*, 7 Ala. 791. Can the complainant then recover in this case? (3). If the question can be considered on this appeal, it is submitted that the chancellor erred in refusing to set aside the decree *pro confesso*, as defendants were not allowed thirty days in which to answer or plead.—Code, § 2823; 117th Rule of Ch. Practice.

H. C. LINDSEY, *contra*.—(1). Our statute has determined how a conveyance is to be made. It must be signed at the foot by the contracting (granting) party.—Code of 1876, § 2145. See also Watts' & Troy's Ala. Form Book, form for warranty deed; Willard on Real Estate and Con. p. 381. (2). Whether the chancellor erred in refusing to set aside the decrees *pro confesso*, can not be considered on this appeal. It is not such an interlocutory decree as can be appealed from.—Code of 1876, § 3918. (3). The statute of frauds has no application to this case. Brandt on Suretyship and Guaranty, § 196; *Beal v. Brown*, 13 Allen, p. 114.

SOMERVILLE, J.—This cause is here on appeal from an an interlocutory decree of the chancellor, overruling a motion made to dismiss the bill for want of equity. The motion was made after a decree *pro confesso* on the bill, which had been entered on the thirtieth day after the service of the summons, and which the chancellor had declined to set aside on suggestion of its irregularity by the defendants.

We are of opinion that the appellants had the right to move to dismiss for want of equity notwithstanding the decree *pro confesso* against them. The general rule, it is true, is, that a defendant against whom such a decree has been rendered for failure to answer is considered as being in *contempt* and he can not ordinarily be heard for any purpose before the court.—*Mussina v. Bartlett*, 8 Port. 277. But the statute provides that he "can appear and contest a decree on the merits of the bill, or may appear before the register on a reference."—Code, 1876, § 3826. Rule number 76 of Chancery Practice further provides that "a defendant may at any stage of the cause move to dismiss a bill for want of equity, unless a similar motion has been made and determined."—Code, p. 172. The decree was clearly no bar to the motion, as has been heretofore expressly adjudged by this court.—*Thornton v. Neal*, 49 Ala. 590; *Smith v. Robinson*, 11 Ala. 840.

The bill is one filed by a surety, who has paid a mortgage debt, and its design is to sell the property expressly conveyed in the mortgage as an indemnity to hold him harmless. The mortgage debt is evidenced by a promissory note signed by the



[Madden v. Floyd.]

appellant, A. A. Madden, as principal, and the appellee, Floyd, as surety, and is fully described in the mortgage itself. The objection urged is, that the mortgage is void for uncertainty on the ground that it is signed by three persons, no one of whose names appears in the granting clause of the conveyance, otherwise than under the general designation of the personal pronoun "I." If the words in an ordinary promissory note are "I promise to pay," and there are many promisors, it is the several promise of each, as well as the joint promise of all.—1 Parsons' Bills and Notes, 251. It is unnecessary to decide that a similar rule applies to deeds and mortgages. The rule as to the latter is settled to be, that where several persons sign such a conveyance, and the names of one or more of them fail to appear as grantors described in the body of the instrument, those not so named are not bound, and it is not their deed.—*Harrison v. Simons*, 55 Ala. 510; *Peabody v. Hewett*, 52 Me. 50. The only object of description is obviously to distinguish one person from another, and it "seems to be sufficient if this is effected, though the true name of the party be not used, or even no name at all." The description is sufficiently certain, if the identity of the party can be worked out through a proper application of the maxim, *Id certum est quod certum reddi potest*.—3 Wash Real Prop. 236–37. This is easily done if we construe the mortgage and note together, which are parts of the same transaction and constitute but one contract, the one being fully described in the other. It is thus manifest that A. A. Madden, the principal in the note, is also the person intended to be described as the maker of the mortgage.

It is further insisted by appellants that the note secured by the mortgage, according to the allegations of the bill, is void under the statute of frauds as "a special promise to answer for the debt, default, or miscarriage of another," because it fails to express the consideration.—Code, § 2121. The statute, we think, has no application to the case. There is no effort to enforce the obligation of a guarantor. Here the surety has paid the debt, and the principal is liable to refund the amount as money paid on request. The original note has been discharged by payment, and a new debt has been created between new parties. It is not affected in any manner by the statute of frauds. Brandt on Suretyship, § 196; *Beal v. Brown*, 13 Allen (Mass.), 114.

The decree *pro confesso* was clearly taken one day too soon, the defendants having thirty entire days within which to answer or plead to the bill after service of the summons. Being rendered on the *thirtieth* day, under the usual, prescribed system of computation, it was irregular.—Code, § 3824; *Ib.* § 11; *Pittfield v. Gazzam*, 2 Ala. 325. This, however, constitutes no

[Boon v. The State.]

sufficient ground for assignment of error, in the present status of the cause, as it is only here on appeal from the decree refusing to dismiss for want of equity, under the provisions of a special statute authorizing such appeals.

There is no error in the decree of the chancellor and it is accordingly affirmed.

## Boon v. The State.

### *Indictment for Retailing.*

1. *Retailing; violation of local law; sufficiency of indictment.*—Under the statute (Code of 1876, § 4806), a defendant may be convicted of the violation of a local law prohibiting the sale of spirituous liquors, under an indictment charging that he “did sell vinous or spirituous liquors without a license and contrary to law.”

APPEAL from Randolph Circuit Court.

Tried before Hon. JAMES E. COBB.

The indictment in this case charged that the defendant “did sell vinous or spirituous liquors without a license and contrary to law.” The evidence on the trial disclosed that under and in pursuance of an act of the General Assembly, authorizing elections to be held in the county of Randolph and other counties therein named, for the purpose of prohibiting the sale or other disposition of vinous or spirituous liquors within certain limits in such counties, approved March 19th, 1875, (Pamph. Acts 1874-5, p. 276), an election and other proceedings prescribed by the act were duly had within a given territory which embraced the county of Randolph, prohibiting the sale or giving away of vinous or spirituous liquors in that territory; and that the defendant within twelve months before the finding of the indictment, and in the county of Randolph, sold a bottle of intoxicating bitters. Under the rulings of the Circuit Court the defendant was convicted. The question raised in the court below, and reserved for the consideration of this court, is whether the defendant could be convicted for a violation of the local statute under the indictment returned against him.

SMITH & SMITH, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The question raised by this record was decided  
VOL. LXIX.

[McCall v. The State.]

adversely to appellant in *Ulmer v. The State*, 61 Ala. 208, and in *Powell v. The State*, ante 10. See, also, *Elam v. The State*, 25 Ala. 53.

Affirmed.

## McCall v. The State.

### *Indictment for Larceny of Part of Outstanding Crop.*

1. *When parties tenants in common.*—Under a contract between several parties entered into for the purpose of engaging in farming, by the terms of which one of the parties was to furnish the land and “necessary teams, wagons, farming implements, feed for teams and blacksmith work,” and the other parties were to “furnish all the labor necessary to make a crop,” and the crop was to be divided between all the parties, in shares fixed by the contract, the parties thereto are tenants in common of the crop raised thereunder.

2. *Sections 3474 and 3475 of the Code construed.*—Sections 3474 and 3475 of the Code did not totally abrogate or abolish the relation of tenants in common in the cases coming within their influence; but only modified it so as to give to each tenant in common a lien on the share of the other in the crop jointly raised, with the remedy of enforcing it by attachment.—*Collier & Son v. Faulke & Martin*, ante 58, and *Holcombe v. The State*, ante 218, re-affirmed on this point.

3. *Outstanding crop of corn not personal property.*—An outstanding crop of corn is not personal property, and is, therefore, not protected by the provisions of section 4355 of the Code.

APPEAL from Lowndes Circuit Court.

Tried before HON JOHN MOORE.

At the fall term, 1881, of said court, the appellant was indicted for the larceny of a part of an outstanding crop of corn, alleged in one count to be the property of John Streety, and in another, to be the property of John Miller. The evidence introduced on the trial tended to show, that the appellant, in the fall of 1881, prior to the finding of the indictment, took and carried away from a field a part of an outstanding crop of corn, under circumstances evidencing a felonious intent; but that the crop of corn grown in said field was cultivated and raised by him and other laborers, under a contract with John P. Streety & Co., by the terms of which Streety & Co. were to furnish the land and “necessary teams, wagons, farming implements, feed for teams and blacksmith work,” and appellant and the other laborers were to “furnish all the labor necessary to make a crop,” and of the crop raised by them under said contract, Streety & Co. were to have one half, and appellant



[McCall v. The State.]

and the other laborers were to have the other half. This being substantially all the evidence, the appellant asked the court in writing to charge the jury as follows: "If the jury find that the corn which the defendant is charged with taking was a part of the crop grown by him and others, parties to the contract with Streety & Co., in evidence, under said contract, and that there is no evidence of his taking any other corn than that which had been grown and raised under said contract; and that he was a party to said contract, and aided in raising said crop, and that at the time of taking, he had an interest in the corn under said contract, then the jury can not convict him." The court refused to give this charge, and the appellant excepted.

Appellant's counsel not disclosed by the record.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The evidence shows that the defendant was a tenant in common of the outstanding corn crop, a portion of which he is charged with stealing. Upon the authority of *Holcombe v. The State*, ante 218, and of *Collier & Son v. Faulke & Martin*, ante 58, construing sections 3474 and 3475 of the present Code, the judgment of the Circuit Court must be reversed. And in as much as the facts disclosed fail to show that the defendant is guilty of any crime, either statutory or known to the common law, the cause will not be remanded, but an order will be entered here discharging him from further legal custody.

Under the provisions of section 4355 of the Code, an indictment lies against one tenant in common of *personal property* for a fraudulent conversion of his co-tenant's undivided interest. A growing crop of corn, however, is not personal property, and hence the section in question has no application to the facts of this case.—*Harris v. The State*, 60 Ala. 50.

## Page v. The State.

### *Indictment for an Assault with Intent to Murder or Maim.*

1 *Plea of self-defense ; when it can not be invoked.*—Any one who brings on, or provokes a personal rencounter, thereby disables himself from relying on the plea of self-defense in justification of a blow which he struck during such rencounter.

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

At the February Term, 1881, of said court, the defendant was indicted for an assault upon one Lorenzo Phillips, with the intent to murder or maim him; and the cause was tried on the plea of not guilty. On the trial, the State examined said Phillips as a witness, who testified that "within twelve months before the indictment was found, and in Montgomery county, he was clerking in a store, when defendant came in and asked for his account. The correctness of the account was denied by defendant, though he paid it. After this, witness told defendant that his wife owed an account at said store, and defendant denied the correctness of that account, and said that witness had swindled or cheated him before. This led to some words between them which culminated in a quarrel between witness and defendant, when defendant dared him out of the store, and with an oath told him if he came out, he, defendant, would chill the blood in witness. Defendant then went out of the store," and after some moments witness followed, taking in his hand a scale weight. As he was going out of the door, he saw defendant with an axe in his hand. As witness reached the ground, he stumbled and fell on one knee, and "as he fell defendant raised the axe in a striking attitude and advanced towards witness. Witness then threw the weight at defendant, and immediately thereupon witness received a blow with the axe from the hands of defendant which knocked him down and cut a gash about two inches long in witness' face. Defendant then threw down the axe and ran." This witness was substantially corroborated by others. The evidence tended to show that defendant had no axe in his hand when he was in the store. This being substantially all the evidence bearing on the question raised by the bill of exceptions, the court charged the jury, among other things, that "if one person challenges another to

[Page v. The State.]

fight and the other accepts the challenge,\* and they go out and fight, then neither can invoke the right of self-defense in justification." To the giving of this charge the defendant excepted. The defendant was convicted of an assault and battery. The error assigned is the giving of the above noted charge.

JOHN GINDRAT WINTER, for appellant.—The charge of the court was clearly erroneous. It took away from the consideration of the jury the question as to whether or not the "challenge to fight" was with deadly weapons. It not only excluded from the consideration of the jury the question as to whether or not the defendant, by his conduct, produced the *necessity* for striking the blow, but stated in effect that his fighting in pursuance of the "challenge to fight" produced, *of itself, the necessity*. See *Eiland v. The State*, 52 Ala. 322.

H. C. TOMPKINS, Attorney-General, for the State.—The proof in this cause shows, that defendant went upon the premises of the person assaulted, raised a difficulty with him, and dared him out of his house to fight. Thus having challenged the assailed to fight, he could, under no possible circumstances, have invoked the doctrine of self-defense, unless he quit the combat and retreated as far as he could. This the proof showed the defendant did not do, but waited on the outside for the challenged party, and, when he came out, advanced upon him. There was, therefore, no error in the charge of the court.—*Lewis v. The State*, 51 Ala. 1; *Eiland v. The State*, 52 Ala. 322; *Cross v. The State*, 63 Ala. 40; *Hill v. The State*, 4 Dev. & Bat. 491; *Vaiden v. The Com.*, 12 Gratt. 730; 1 Hale P. C. 452, 452, 479.

STONE, J.—Any one who brings on, or provokes a personal rencontre, thereby disables himself to rely on the plea, that the blow he struck in such provoked difficulty was inflicted in self-defense.—1 Bish. Cr. Law, § 844; *State v. Neeley*, 20 Iowa, 108; *Adams v. People*, 47 Ill. 376; *State v. Starr*, 38 Mo. 270. See, also, authorities on brief of the Attorney-General.

Affirmed.



## Pace & Cox v. The State.

### *Indictment against White Person and Negro for Living in Adultery.*

1. *Indictment against white person and negro for living in adultery or fornication; when sufficient.*—An indictment charging that “Tony Pace, a negro, or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication,” sufficiently charges the offense of living in adultery or fornication, as demanded by section 4189 of the Code of 1876.

2. *§ 4189 of the Code of 1876, not violative of Constitution of United States.*—The fact that the punishment affixed to the offense of living in adultery or fornication, when committed by a negro and white person together, is different from that affixed to that offense when committed by two white persons or two negroes, is not a discrimination in favor of, or against either race; and the statute prescribing such punishment (Code of 1876, § 4189), is not violative of the 14th amendment of the constitution of the United States.

3. *When charge requested is presumed to be erroneous.*—Where the bill of exceptions fails to set out all the evidence, a charge requested by the appellant and refused by the court, will be presumed to be abstract, when it is not supported by the evidence which is set out in the bill of exceptions.

4. *Only one christian name known to the law.*—The law knows but one christian name, and the insertion or omission of a defendant’s middle name in an indictment is entirely immaterial; and a mistake in the middle name will not support a plea of misnomer.

### APPEAL from Clarke Circuit Court.

Tried before Hon. WM. E. CLARKE.

At the Fall Term, 1881, of said court, an indictment was found against the appellants which, after the caption, is in these words: “The grand jury of said county charge, that before the finding of this indictment, Tony Pace, a negro, or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication, against the peace and dignity of the State of Alabama.” Mary Ann Cox filed a plea of misnomer, averring, in substance, that her christian name was Mary *Jane*, and not Mary *Ann*, to which plea the State demurred on the ground, that the plea admitted the defendant’s name was Mary, as charged in the indictment, and that the insertion of the middle name, Ann, was immaterial. The court sustained the demurrer; and thereupon the defendant pleaded not guilty, and upon this issue the cause was tried. No evidence is set out in the bill of exceptions. A charge was asked by them in writing

[Pace &amp; Cox v. The State.]

and refused by the court; but the view taken thereof by this court renders it unnecessary to set it out. The defendants were found guilty by the jury, and the court sentenced them to two years confinement in the penitentiary.

JOHN R. TOMPKINS, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment here charges, that, “Tony Pace, *a negro*, or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a *white woman*, did *live together in a state of adultery or fornication*.” The offense charged is that denounced by section 4189 of the Code. The language of this section is, “live in adultery or fornication *with each other*.” We think there is no essential difference in the signification of the phrases used respectively in the indictment and statute, and that they are substantially the same in meaning. In Form number 22 of indictments, for living in adultery or fornication, under § 4184 of the Code, both are indiscriminately authorized, and are regarded as synonymous.

The statute, under which this indictment is found, is not, in our opinion, obnoxious to any constitutional objection. It is not, as insisted by appellants’ counsel, violative of the first section of the Fourteenth Amendment of the Federal Constitution, which forbids a State to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” or to “deny to any person within its jurisdiction *the equal protection of the laws*.” The fact that a different punishment is affixed to the offense of adultery when committed between a negro and a white person, and when committed between two white persons or two negroes, does not constitute a discrimination against or in favor of either race. The discrimination is not directed against the person of any particular color or race, but against *the offense*, the nature of which is *determined by the opposite color of the cohabiting parties*. The punishment of each offending party, white and black, is precisely the same. There is obviously no difference or discrimination in the punishment. The evil tendency of the crime of living in adultery or fornication is greater when it is committed between persons of the two races, than between persons of the same race. Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government. To thus punish the crime denounced by the statute, by imposing the same term of

[John Berney v. The State.]

imprisonment and the identical amount of fine upon each and every person guilty of it, can in no sense result in any inequality in the operation or protection of the law. This view of the case is fully settled by the past decisions of this court, upon which it is entirely needless to enlarge.—*Green v. The State*, 58 Ala. 190; *Ford v. The State*, 53 Ala. 150; *Ellis v. The State*, 42 Ala. 525; *Hoover v. The State*, 59 Ala. 57. It is also sustained by the decisions of the highest courts of many of our sister States; *State v. Gibson*, 36 Ind. 389 (S. C. 10 Amer. Rep. 42); *State v. Kennedy*, 76 N. C. 251 (S. C. 22 Amer. Rep. 683); *Frasher v. The State*, 3 Tex. Ct. Appeals, 263 (S. C. 30 Amer. Rep. 131); *Kinney's Case*, 30 Gratt. (Va.) 859 (S. C. 32 Amer. Rep. 690.)

The bill of exceptions fails to set out all the evidence, and in the absence of it, we can not assume that the court erred in refusing to give the charge requested by appellant. The charge will be presumed to be abstract unless it is shown to be supported by the evidence as appearing in the bill of exceptions. 1 Brick. Dig. p. 338, § 40.

The demurrer to the plea in abatement of the defendant Cox was properly sustained. The law knows but one christian name, and it has been held by this court that the omission or insertion of a middle name is entirely immaterial and may be disregarded. If a middle name is averred, it need not be proved.—*Edmundson v. The State*, 17 Ala. 179.

The judgment of the Circuit Court must be affirmed.

## John Berney v. The State.

### *Indictment for Carrying Concealed Weapon.*

1. *Admissibility of evidence.*—Where a showing for a continuance is offered in evidence as a whole, and a part of it is inadmissible, the court is not required to examine it for the purpose of distinguishing the admissible from the inadmissible parts thereof, and of receiving the one and excluding the other, but may, on objection, exclude it entirely.

2. *Same.*—In a prosecution for carrying a concealed pistol, the defense being that the defendant had been threatened with, and had good reason to apprehend, an attack, it is not permissible for him to show, that a person to whom he had spoken of the threat advised him to arm himself.

3. *When conduct leading to arrest and discovery of crime inadmissible.* In such prosecution, disorderly conduct on the part of the defendant, which caused his arrest and led to the discovery of the concealed weapon, is irrelevant and inadmissible against him. While such conduct may have been part of the *res gesta*, and explanatory of the arrest, yet it had no tendency to prove or disprove the charge against the defendant, but did have a tendency to prejudice the jury unduly against him.



[John Berney v. The State.]

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

The defendant was indicted, tried and convicted for carrying a pistol concealed about his person. On the trial, the State examined as a witness one Cook, who testified that while on duty as a policeman of the city of Montgomery, he was present at a political meeting held at a public place in said city in the month of November, 1880, and that the defendant was also present; that the defendant's conduct at the meeting was disorderly, and it having a tendency to create a disturbance, he arrested the defendant and found the pistol concealed. The defendant moved to exclude so much of the witness' testimony as related to the defendant's conduct which led to his arrest; but his motion was overruled by the court, and he excepted. The defendant having introduced evidence tending to show that Jesse Chilton had threatened to attack him, offered in evidence a showing for a continuance, which the solicitor admitted before the trial certain absent witnesses would testify to, if present. This showing contained, among other things, a statement of a conversation between the defendant and one Pruitt, his employer, in which, having mentioned the fact that he had been threatened by Chilton, the defendant asked him what to do, and Pruitt, in reply, told him to arm himself, but to be careful to avoid a difficulty, if possible. On objection by the State, the court refused to allow the defendant to introduce the showing, and to this ruling he excepted. The errors assigned are the rulings of the City Court above noted.

JOHN GINDRAT WINTER, for the appellant, cited *Shorter v. The State*, 63 Ala. 129; *Wesley v. The State*, 52 Ala. 182; *Gandy v. Humphries*, 35 Ala. 617; 1 Greenl. on Ev. 139.

H. C. TOMPKINS, Attorney-General, with whom was F. S. FERGUSON, Solicitor of the Second Judicial Circuit, for the State, cited *Johnson v. The State*, 29 Ala. 62; *Lawson v. The State*, 20 Ala. 65; *Stroud v. The State*, 55 Ala. 77; 1 Brick. Dig. p. 887, § 1202.

BRICKELL, C. J.—The admission made by the solicitor as to the evidence of the absent witnesses, Turner and Pruitt, was offered as a whole. If any part of it was inadmissible, the City Court did not err in excluding it entirely. It was not the duty of the court to examine it, distinguishing the admissible from the inadmissible, receiving the one and excluding the other. 1 Brick. Dig. 887, § 1202. The part of it containing the advice Pruitt gave the defendant when he heard of Chilton's threat and procured the pistol, was irrelevant and should not

## [Carson v. The State.]

have been admitted. If the threat the defendant was informed Chilton had made, would have justified carrying the pistol concealed, of itself it afforded the justification, whatever may have been the advice given, or opinion expressed by Pruitt. Whether it was a justification—whether it was a threat of an attack upon the defendant, or gave the defendant good reason to apprehend an attack, was for the determination of the jury in view of the facts before them. In their determination, they could not be aided or influenced by a consideration of the impression it made on Pruitt, and the opinion or advice he was induced to give the defendant.

The conduct of the defendant at the political meeting, furnishing the cause of his arrest, was irrelevant and ought to have been excluded. It may have been part of the *res gestæ* and explanatory of the arrest, and the arrest may have led to the discovery that he was carrying a pistol concealed about his person. If the main fact in this cause, or if a material fact, was the arrest, that conduct would be so connected with it that evidence of it would be admissible. The main fact in controversy was the carrying of the pistol concealed, under circumstances not warranting it by law. Facts not having a tendency to the proof or disproof of this fact, and especially circumstances having a tendency to prejudice the jury unduly against the accused, ought not to be admitted in evidence.—*State v. Wisdom*, 8 Port. 511; *Campbell v. State*, 23 Ala. 44.

For the error in the admission of this evidence, the judgment must be reversed and the cause remanded; the prisoner remaining in custody until discharged by due course of law.

## Carson v. The State.

### *Indictment for Selling Liquors contrary to Local Statute.*

1. *Constitutional law; section 2 of Art. 4 of Constitution of 1875 construed.*—The constitutional provision requiring that each law shall contain but one subject, which shall be clearly expressed in its title (Con. 1875, § 2, Art. 4), is intended to prohibit the legislature from introducing into the body of an act such foreign or incongruous matters as are not reasonably comprehended within the title; but not from embodying in an act various details relating to one general subject, which is so expressed in the title as not to mislead or deceive.

2. *Same; when act not violative thereof.*—The act entitled “An act to prohibit the sale or otherwise disposing of spirituous, vinous or malt liquors within one mile of the court house in the town of Ashville, in St. Clair county,” approved February 1st, 1871, (Pamph. Acts, 1870-1, p. 189), which, in the body thereof, prohibits the selling, giving or deliver-

[Carson v. The State.]

ing of "spirituous, vinous or malt liquors, ale, lager beer, or intoxicating bitters, in quantities less than forty gallons" within the territory designated in the title, and which contains two provisos excepting certain cases from its operation, is not violative of the constitutional provision requiring that each law shall contain but one subject, which shall be clearly expressed in its title.

3. *Local statute; public in its nature; how pleaded.*—Such statute, though local in its nature, extends to all persons who might come within the territory described, and is a public statute, of which the courts are required to take judicial notice without being pleaded; and an indictment charging a violation thereof is sufficient, which refers to it by its general tenor, and further describes it by the date of its approval.

4. *Indictment; exceptions created by a proviso to an act need not be negatived.*—Where an exception is incorporated into the enacting clause of a statute, the indictment must show, by proper averment, that the defendant did not come within the operation of the exception; but where such exception is created by a proviso to the act, it is a matter of defense for the defendant to show that he did come within the exception, and this defense need not be anticipated by averment in the indictment.

5. *Intoxicating liquors; when witness may give his opinion as to the intoxicating properties of.*—In a prosecution for selling intoxicating liquors in violation of law, it is competent for a witness, who is shown to have had such an opportunity of personal observation or of experience as to enable him to form a correct opinion, to testify to his opinion as to the intoxicating properties of liquors shown to have been sold by the defendant, although he is not shown to be a technical expert.

6. *Evidence; admissibility of.*—In such a prosecution testimony showing how the liquors were labeled is irrelevant, as the question for the jury to determine in such case is, what are the *actual* properties of the liquor sold, and not what were its *represented* properties.

7. *Local statute prohibiting sale of liquors; when exception in favor of physicians can not be incorporated by the courts.*—Where a local statute prohibiting the sale of spirituous, vinous or malt liquors and intoxicating bitters within a prescribed territory, contains no exception in favor of physicians or druggists, such exception can not be incorporated therein by the courts.

8. *Same.*—Hence it is no defense to an indictment charging a sale of or gift of intoxicating bitters in violation of such statute, that the defendant was a licensed practicing physician, and gave or sold them, in good faith as a prescription, to the witness who was under his treatment, although it is shown that such was a proper and scientific treatment of the disease for which he was prescribing.

9. *Same.*—But "we are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute."

APPEAL from St. Clair Circuit Court.

Tried before Hon. L. F. Box.

The indictment in this cause charged that the defendant "did sell intoxicating bitters to a person in quantities less than forty gallons, within one mile of the court house, in the town of Ashville, in the county of St. Clair, contrary to an act of the General Assembly of the State of Alabama, approved February 1st, 1871, and against the peace," etc. The defendant demurred to the indictment, and his demurrer having been



[Carson v. The State.]

overruled, the cause was tried on the plea of not guilty, and the defendant was convicted of the offense charged against him. On the trial, one Hood was examined as a witness for the State, who testified, in substance, that within twelve months before the finding of the indictment, and within the territory mentioned therein, he applied to the defendant, who was a licensed practicing physician, and who was then and had been for several months prior to that time, prescribing for the witness for a disease with which he was and had been suffering, and which he described to the jury, for whiskey in which to take some medicine which the defendant had previously prescribed for him; that the defendant had no whiskey, but that he sold to the defendant "some bitters," which he said would aid the medicine; that he did not know whether the bitters were intoxicating or not, as he only took a small quantity of them at a time as medicine. On cross-examination the defendant asked the witness, whether the bitters were labeled as a medicine. The court sustained an objection interposed by the State to this question, and refused to allow the witness to answer it, and the defendant excepted. The State then examined as a witness one Yarbrough, who testified that he took a drink of the bitters purchased by the witness, Hood, from the defendant, and that the bitters were, in his opinion, intoxicating. The defendant objected to this testimony on the ground, that it had not been shown that the witness was a druggist, physician "or in any way an expert in such matters;" but the court overruled his objection, and he excepted. The defendant then offered to prove by a practicing physician, that in his opinion the bitters were beneficial to the disease with which the witness Hood was afflicted, and the proper medical treatment therefor, but the court, on the objection of the State, refused to allow this testimony to go to the jury, and the defendant excepted. This being the substance of the evidence introduced on the trial, the defendant asked the court in writing to give to the jury the following charges: 1. "That if the jury believed from the evidence, that the defendant, at the time the witness obtained the bitters alleged to have been sold, was a practicing physician in the town of Ashville, Alabama; and that the witness was then his patient under treatment for disease, and that the defendant, in good faith, prescribed such bitters as a medicine to be used by Hood as such patient, then the defendant is not guilty." 2. "That if the jury believed from the evidence, that the witness obtained the bitters from the defendant as a practicing physician, and under a prescription made by the defendant as a practicing physician for witness, as his patient, then such transaction was not a sale under the act under which the defendant is indicted in this case."

[Carson v. The State.]

The court refused these charges, and the defendant duly excepted.

The rulings of the Circuit Court above noted are here assigned as error.

JOHN W. INZER, for appellant. (1). The act under which the defendant was indicted, or so much thereof as makes it an offense to sell or dispose of intoxicating bitters within the prescribed limits, is in violation of the provision of the constitution which requires that each law shall contain but one subject, which shall be clearly expressed in its title.—Con. 1868, Art. 4, § 2; Con. 1875, Art. 4, § 2. There is a material difference in the caption of the act and the body thereof. The caption is to *prohibit* the sale or otherwise disposing of spirituous, vinous or malt liquors within one mile, etc.; while the act itself prohibits the selling, giving or disposing of, by one person to another, spirituous, vinous or malt liquors, ale, lager beer, or *intoxicating bitters* in quantities *less than forty gallons* within the prescribed limits, and also *excepts* certain places within such limits. The caption of the act, therefore, indicates a *total prohibition* of the sale or other disposition of *spirituous, vinous or malt liquors*; while the act itself is only a *partial prohibition*, not only of the liquors named in the caption, but also of *ale, lager beer and intoxicating bitters*. (2). The act was passed to prevent the sale or other disposition of the liquors named, to be used as a beverage, and to prevent persons from engaging in the sale thereof as a business; and not to prohibit a physician from using liquors in good faith in his practice as a drug or medicine. Section 4208 of the Code of 1876, as amended (Acts 1878-9 p. 71), makes it an offense for any one in this State to sell vinous or spirituous liquors in quantities less than a quart without a license. This law never applied, nor was it intended to apply to physicians who used alcoholic stimulants in their practice, in good faith, as a medicine. So in reference to the local statute under which the defendant was indicted. It was never intended to prohibit the use of such liquors by physicians in their practice. A case which is out of the mischief intended to be remedied by the statute, is out of the purview thereof, although it may be within its words.—2 Brick. Dig. p. 462, § 18. See also *Huffman v. The State*, 29 Ala. 40.

H. C. TOMPKINS, Attorney-General, for the State. (1). The object of the constitutional provision in question is to prevent the introduction of matters incongruous with the title and foreign to each other. The subject named in the title is the prohibition of the sale of certain named intoxicating liquors;

[Carson v. The State.]

and the prohibition of such sales in quantities less than forty gallons, is not incongruous with that title. Nor is the extension of the prohibition in the body of the act to intoxicating bitters the introduction of foreign matter, since such bitters are intoxicating necessarily because they consist principally of one of the named prohibited liquors.—*Ex parte Pollard*, 40 Ala. 77; *Key v. Jones*, 52 Ala. 238; *Ex parte Hickey*, *Ib.* 228. (2). There is nothing in the point made by the demurrer that the indictment does not negative the idea, that the defendant was within the exception contained in the proviso.—*Clark v. The State*, 19 Ala. 552. (3). Whether a given liquor is intoxicating or not, is a question upon which any person may testify to his opinion. It is not necessary that he should be a druggist, doctor, or an expert. (4). The act makes no exception in favor of liquors sold as medicines and this court can make none.—*Bain v. The State*, 61 Ala. 75; *Philips v. The State*, 2 Yerg. 458; *State v. Whitney*, 15 Ver. 298; *Com. v. Kimball*, 24 Pick. 366; *State v. Brown*, 31 Me. 522; *Com. v. Sloan*, 4 Cush. 52.

SOMERVILLE, J.—The appellant was convicted in this case of selling intoxicating bitters contrary to the provisions of a local or special prohibitory law. The law in question was approved February 1st, 1871, and is entitled “An act to prohibit the sale or otherwise disposing of spirituous, vinous or malt liquors, within one mile of the court house in the town of Ashville, in St. Clair county.” It prohibits the selling, giving or delivering to any person of “spirituous, vinous or malt liquors, ale, lager beer or *intoxicating bitters*, in quantities *less than forty gallons*,” within one mile from the court house of St. Clair county, in the town of Ashville. There are two *provisos* to the act, which except certain cases from its operation, not here necessary to be mentioned.

It is urged that this act is unconstitutional, as being violative of that clause of the constitution which provides that “each law shall contain but one subject, which shall be clearly expressed in its title,” etc.—Con. 1875, Art. 4, § 2; Con. 1868, Art. 4, § 2. The grounds of this objection are, in our opinion, untenable. The subject of the act has reference to the prohibition of the sale of certain liquors. This need not be an entire or total prohibition, but it may be a partial one, or a mere regulation of the subject-matter only. Intoxicating bitters, too, may manifestly be included within the class of liquors described in the title. The purpose of this constitutional provision was to prevent the introduction, into the body of an act, of any such foreign or incongruous matter as may not reasonably be comprehended within the title, or be properly



[Carson v. The State.]

referable to it. It is not to be objected that the law contains various details, if they all relate to one general subject, and the title of the act itself is so definite as not to mislead or deceive.—*Ex parte Pollard*, 40 Ala. 77, and other authorities cited by the Attorney-General. See also *Woodson v. Murdock*, 22 Wall. 351; *Dorsey's Appeal*, 72 Penn. St. 192; *Mills v. Charleton*, 9 Amer. Rep. 578.

The indictment charged a violation of this special law with sufficient definiteness. It was referred by its general tenor and further described by the date of its approval. It was unnecessary to set forth the whole act, as is insisted on by appellant's counsel. It was a *public* statute, of which the court was required to take judicial notice without being pleaded. Though local in its nature, it extended to all persons who might come within the territorial limits described, and to this extent it concerned the public generally.—1 Whart. Law. Ev. § 293; *Levy v. The State*, 6 Ind 281; *Crawford v. Planter's and Merchant's Bank, Mobile*, 6 Ala. 289.

It was unnecessary for the indictment to aver that the defendant did not come within the operation of the exceptions created by the *provisos* of the act. This was matter of defense not required to be anticipated by the prosecution, but which would more properly come from the defendant. The rule would, however, be otherwise in cases where exceptions are incorporated in the *enacting clause*, for then it would be necessary to negative them in order to bring the alleged crime within the words of the statute.—1 Whart Cr. Law, § 379; 1 Bish. Cr. Proc §§ 631–633; *Clark v. The State*, 19 Ala. 552; *Becker v. The State*, 8 Ohio St. Rep. (N. S.) 391.

It was competent for the witness Yarbrough to testify to his opinion as to the intoxicating properties of the bitters proved to have been sold by the defendant. This is a matter of common knowledge, where a witness is shown to have had an opportunity of personal observation, or of experience, such as to enable him to form a correct opinion. It is not required that he should be a technical expert.—*Merkle v. The State*, 37 Ala. 139.

The evidence was properly excluded showing how the bitters were labeled. This was irrelevant, as it rendered them neither more nor less intoxicating. The *actual* properties of the beverage sold was the question submitted to the jury, not the *represented* properties.

The evidence in this case showed that the defendant was a licensed practising physician and that he prescribed the bitters which he is alleged to have sold, to a patient who was at the time under his treatment. It was also proposed to be proved,

[Carson v. The State.]

by expert medical testimony, that this was the proper scientific treatment in the given case.

It was contended, under this state of facts, that if the appellant gave or sold the bitters in question as a prescription, and in good faith, he would not come within the prohibition of the statute, and should be acquitted, and the correctness of this view is directly raised by the charges requested to be given at the instance of the appellant.

We know of no principle of law which would authorize us to incorporate so important an exception into the statute. The facts of the case may have constituted a good reason why the grand jury should have refused to find a bill, but there is no exception made in the statute in favor of physicians, druggists, or any other persons whomsoever, and this court can not engraft one in their favor without the exercise of the legislative power, which it does not possess. The question presented is not a novel one, though not before decided in this State. Mr. Wharton states the rule to be, that, "unless there is an express exception in the statute the fact that the liquor was bought for *medicine* is no defense."—3 Whart Amer. Law, § 2439.

In the case of the *Commonwealth v. Kimball*, 24 Pick. 366, the point was made, that where liquor was bought to be used *bona fide* for the purpose of medicine, the sale of it did not come within the purview of a prohibitory liquor law, general in its terms. Chief Justice SHAW observed in answer to this suggestion: "If it were sufficient to avoid the prohibition of the statute, for the purchaser to say that the spirits were intended for medicine, it would, in effect, repeal the statute. But the decisive answer is that the legislature has made no such exception." The same or similar points have been repeatedly settled in other cases. See *State v. Brown*, 31 Me. 522; *Woods v. The State*, 36 Ark. 36, (S. C. 38 Amer. Rep. 22); *Wright v. The State*, 101 Ill. 126, and other authorities cited in brief of Attorney-General, and in 3 Whart. Cr. Law, § 2439, note (g).

The application of any other rule would be fraught with difficulty, if not impracticability. The frequency of imposture on the one hand, and abuse on the other, would be imminent, and sagacious foresight in this respect may have been a potent reason with the General Assembly for excluding exceptions which found place in former statutes relating to the same subject-matter. We are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed, or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute.

[Woodbury v. The State.]

We discover no errors in any ruling of the Circuit Court, and its judgment is affirmed.

## Woodbury v. The State.

### *Indictment for obtaining Personal Property under False Pretenses.*

1. *Charges of the court ex mero motu ; how case should be presented to the jury by.*—The general charge of the court, given *ex mero motu*, should present the case on trial in all the phases and aspects in which the jury ought to consider it, not giving any undue prominence to, or leaving in obscurity any phase or aspect, which the testimony tends to support ; and if such charge in effect discards, or ignores, and thereby induces the jury to discard any real, material element of the offense imputed to the accused, it ought not to be supported.

2. *False pretenses ; when indictable.*—A false pretense, to be indictable, must be calculated to deceive and defraud, and must be of a material fact, on which the party to whom it is made, has the right to rely, and not the mere expression of an opinion, or of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge.

3. *Same ; want of prudence in the party to whom made, no defense.*—As a general rule, if the pretense is not absurd or irrational, or if the party to whom it is made had not, at the very time it was made and acted upon, the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense.

4. *Same ; false statement as to location of residence, when sufficient.* Under an indictment for obtaining personal property under false pretenses, if the residence of the accused at a particular locality was a material fact in the transaction between him and the party from whom he obtained the property ; and if, with the intent to defraud such party, he misrepresented the locality of his residence, and by means of the misrepresentation obtained the property, the misrepresentation being a controlling inducement with the owner to part with the property, it is no defense, that, if the owner had taken the precaution to inquire at the particular locality, he could have found that it was not the residence of the accused, and would not have been deceived and defrauded.

5. *Same ; must be a controlling inducement with the owner to part with his property.*—While the false pretense need not be the sole, exclusive or decisive cause operating to induce the owner to part with his property, it must be a controlling inducement to that end. If he would not have parted with his property in the absence of the false pretense, the offense is complete.

6. *Charge of the court ; when erroneous.*—As a general rule, if affirmative charges assert correct legal propositions, their generality, obscurity, or ambiguity must be obviated by a request for more specific instructions ; but if the immediate, direct tendency of such instructions is to mislead the jury, diverting their attention from material evidence, and from the consideration of controlling inquiries, or creating the impression that they are authorized to exclude evidence they ought to consider, such instructions are erroneous, and will operate a reversal of the judgment they have induced.



[Woodbury v. The State.]

7. *Same.*—Where, on the trial of a defendant indicted for obtaining a sewing machine under false pretenses, the evidence of the party from whom the defendant obtained the machine tended to show, that he was not influenced in parting with the machine by the false representations made to him by the defendant, a charge given at the request of the State, which assumes to state the elements of the offense, and omits all proper reference to such evidence, has an immediate tendency to mislead the jury, and is erroneous.

APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The defendant was convicted under the second count in an indictment containing three. That count charges, that with intent to defraud, he did falsely pretend to Edwin R. Quattlebaum, that he resided in Mobile, on Chestnut street, between Cleveland and Morton streets, and by reason of such false pretense obtained from the said Edwin R. Quattlebaum, one sewing machine of the value of sixty dollars. On the trial Mr. Quattlebaum and other witnesses were examined on behalf of the State, and their testimony tended to show that the defendant, on or about July 8th, 1881, applied to Mr. Quattlebaum, who was engaged in the business of selling sewing machines, and was at that time unacquainted with the defendant, to purchase a machine, stating to him that his name was John Henry, and that he resided in Mobile on Chestnut street, between Cleveland and Morton streets, of which a memorandum was made by Mr. Quattlebaum; that an agreement was entered into between the defendant and Mr. Quattlebaum to the effect, that the defendant should take a machine worth sixty dollars on trial for a week, and if at the end of that time he liked it and concluded to purchase it, he could do so by making the first payment of five dollars thereon, the balance to be paid afterwards in monthly installments; and that the machine was delivered to a woman living on the designated street for the defendant. The evidence further tended to show that the representation of the defendant as to the location of his residence was false, and that he obtained the machine with an intent to defraud. Mr. Quattlebaum, in his testimony, stated, "that it was not the location of the house that induced him to part with the machine; that he would have let the prisoner have the machine, if he had given him any other address in Mobile. It was the belief that the prisoner had a permanent residence in Mobile, arising from the prisoner giving the order that the machine be delivered at a particular place specified by the prisoner, that induced the witness to part with the machine. That if he had known that the prisoner lived on Palmetto street, between Royal and St. Emanuel [where the testimony tended to show he did live], or if any other person than the prisoner had so told him, and the prisoner had not mentioned his residence, the wit-

[Woodbury v. The State.]

ness would have let him have the machine. But that he would not have let him have the machine unless the prisoner had given him some place of residence, and that he believed that the prisoner lived on Chestnut street, between Cleveland and Morton streets, where the prisoner ordered the machine to be sent."

The court then, at the request of the solicitor, gave separately the following charges: 2. "That it is enough, if a material part of the pretense be false, that it be made with intent to defraud, and that it induces the person sought to be wronged to part with his property on the strength of such representation or pretense." 3. "Whether a material representation was falsely made as of a fact, whether it was made with intent to defraud, whether in consequence of such representation, and relying on it, the owner was induced to part with the alleged thing of value, are all inquiries for the jury under proper instructions. And these being affirmatively proved, conviction should follow irrespective of other representations made and proved as aforesaid, when [it was] the moving inducement to part with the thing; and in this case, if the owner was induced to part with the sewing machine because of false representations made by the defendant, by words, acts, or deeds, with the intent to defraud, and with intent to make the owner believe (no matter what words were used by the defendant), that the defendant resided at the place charged, then the jury should convict." 4. "The court charges the jury that a false pretense is a false representation, which may be in mere oral words, or it may be in writing, or by signs, or the like, relating to some existing or past fact; and if it actually misleads and produces such a cheat as to obtain from another any personal property, with the intent to injure or defraud, it is sufficient." To each of these charges the defendant separately excepted.

The defendant having been convicted, she reserved, by bill of exceptions, the rulings of the lower court above noted for the consideration of this court, and here assigns the same as error.

GREGORY L. SMITH, for appellant.

H. C. TOMPKINS, Attorney-General, and F. B. CLARK, JR., for the State.

BRICKELL, C. J.—The indictment contains three counts:—the first charging the appellant with the larceny of a sewing machine, of the value of sixty dollars,—the second and third charging him with obtaining the machine under false pretenses. The appellant pleaded not guilty, and the verdict was of guilty on the second count, which operates an acquittal on the other counts.

[Woodbury v. The State.]

The questions now presented arise on exceptions to instructions given the jury by the court at the request of the State, and an instruction on the effect of the evidence requested by the appellant, and refused.

The instructions given by the court, numbered in the bill of exceptions two, three and four, are assailed upon the ground, that while assuming to state the elements of the offense of obtaining money or goods under false pretenses, they utterly omit or ignore the important inquiry, whether the particular pretense alleged had a capacity, if false, to mislead and to deceive, or having that capacity, the prosecutor acted upon it, and was misled or deceived by it; and whether by the exercise of common prudence, he could not have avoided imposition from it. These instructions were probably intended to be literal extracts from opinions of this court, defining this offense, embodying its elements, so far as the facts of the particular cases, and the questions involved, required a definition of the offense, and a description of its constituent ingredients. As applied to the particular cases, the court is committed to their correctness as legal propositions. But it is very far from being a satisfaction of the duty of a primary court, in instructing the jury, to borrow these propositions, and recite these definitions, without adaptation of them to the facts of the case which is submitted for the consideration and determination of the jury. The mere recitation of definitions, or of elementary principles, is more often calculated to confuse and mislead, than to instruct a jury. The instructions given by the court affirmatively, *ex mero motu*, should present the particular case, in all the phases and aspects in which the jury ought to consider it; not giving any undue prominence to, or leaving in obscurity, any phase or aspect there is evidence tending to support; and if such instructions in effect discard or ignore, and thereby induce the jury to discard or ignore any real, material element of the offense imputed to the accused, they ought not to be supported.—*Corbett v. State*, 31 Ala. 329; *Gooden v. State*, 55 Ala. 178; *Holmes v. The State*, 23 Ala. 17.

A false pretense, to be indictable, must be calculated to deceive and defraud. As of an actionable misrepresentation, it must be of a material fact, on which the party to whom it is made, has the right to rely; not the mere expression of an opinion, and not of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge. Whether the prosecutor could have avoided imposition from the false pretense, if he had exercised ordinary prudence and discretion to detect its falsity, is not a material inquiry. As a general rule, if the pretense is not of itself absurd or irrational, or if he had not at the very time it was made and



[Woodbury v. The State.]

acted on, the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense. 2. Whart. Cr. Law, § 2128. If the residence of the accused at a particular locality was a material fact in the transaction between him and the prosecutor; if 'with the intent to defraud the prosecutor, the prisoner misrepresented the locality of his residence, and by means of the misrepresentation obtained the sewing machine, the misrepresentation being a controlling inducement with the prosecutor to part with his property, it is not a defense, that if the prosecutor had taken the precaution to inquire at the particular locality, he could have found it was not the residence of the prisoner, and would not have been deceived and defrauded. The prosecutor had a right to rely on the representation, and there was no obligation or duty to the prisoner to inquire into its truth, or whether he was dealing fairly and honestly.

The false pretense must not only be, however, of a material fact, but it must have been, not the sole, exclusive or decisive cause, but a controlling inducement with the prosecutor for the transfer of his money or property. Other considerations may mingle with the false pretense, having an influence upon the mind and conduct of the prosecutor; yet, if in the absence of the false pretense, he would not have parted with his property, the offense is complete.—*People v. Haynes*, 11 Wend, 557. But if without the false pretense he would have parted with his property—if that is not an operative, moving cause of the transfer—if he did not rely and act upon it, there may be falsehood, but there is not crime.—2 Whart. Ev. §§ 2120–22. In view of the evidence of the prosecutor, tending strongly to the conclusion, if it is not a positive affirmation, that the misrepresentation of the locality of his residence, imputed to the accused, had no influence with him in causing or inducing him to part with the sewing machine, the instructions given the jury seem to us erroneous. If to this phase of the case, they can be regarded as directing the attention and consideration of the jury, it is only by the construction which counsel, accustomed to a close examination of legal propositions, would place upon them. As a general rule, if affirmative charges assert correct legal propositions, their generality, obscurity, or ambiguity must be obviated by a request for more specific instructions. But if the immediate, direct tendency of such instructions is to mislead the jury, diverting their attention from material evidence, and from the consideration of controlling inquiries, or creating the impression that they are authorized to exclude evidence they ought to consider, such instructions are erroneous, and must operate a reversal of a judgment they have induced.

These instructions, omitting all proper reference to the evi-

VOL. LXIX.

[Collier v. The State.]

dence of the prosecutor, tending to show that he was not influenced in parting with the machine by the representation of the accused, that his residence was at a particular locality, in effect excluding that evidence from the consideration of the jury, had an immediate tendency to mislead them. It was the duty of the court to instruct the jury, that if the misrepresentation was not an inducing, controlling motive with the prosecutor to part with the machine, there should not be a conviction of the accused upon either of the counts for false pretenses.—*Commonwealth v. Davison*, 1 Cush. 33. It is not necessary to pass upon the other exceptions, as this view will probably be decisive of the case on another trial.

Reversed and remanded.

## Collier v. The State.

### *Indictment for Manslaughter.*

1. *Manslaughter in first degree.*—Death caused by a blow intentionally stricken with an instrument calculated to produce death, unless shown to have been inflicted in self-defense, can never be less than manslaughter in the first degree.

2. *When a charge is not a reversible error.*—On the trial of one indicted for manslaughter, a charge that “mere words, no matter how abusive and insulting, never reduce homicide to manslaughter,” although alien to the issue and unnecessary, is without injury to the accused, and will not work a reversal of the judgment of conviction.

3. *Charge; what erroneous.*—The giving of a charge at the request of the State, which pretermits all inquiry as to venue, is a reversible error.

### APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The appellant was indicted for manslaughter. Evidence was introduced on the trial tending to show, that Jim Bradford, the deceased, a few minutes before he was killed by the appellant, had used insulting and abusive language to the appellant's mother in his presence. Evidence was also offered tending to show that the defendant acted in self-defense. The court, at the request of the State, charged the jury as follows: “The court charges the jury, that mere words, no matter how abusive and insulting, never reduce homicide to manslaughter; and no words that Jim Bradford could have used to the defendant's mother, could have justified or excused, under the law, the defendant in shooting Jim Bradford with a pistol, or in taking his life.” The court also gave to the jury, at the request of the

[Harman v. The State.]

State, a charge which authorized a conviction on a hypothetical state of facts, without reference to the venue in which the crime was committed. To the giving of these charges the appellant separately excepted. The jury returned a verdict of guilty, upon which the court rendered judgment; and from this judgment this appeal was taken.

— —, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

STONE, J.—Death caused by a blow intentionally stricken, with an instrument calculated to produce death, unless shown to have been inflicted in self-defense, can never be less than manslaughter in the first degree.—*McManus v. The State*, 36 Ala. 285; *Mitchell v. The State*, 60 Ala. 26. The indictment in this case charges only manslaughter in the first degree, and hence any inquiry into the ingredients of murder, save for the purpose of showing the difference between it and manslaughter, is alien to the issue formed in this case. The first clause of charge numbered 1, while correct as a principle of law, was probably unnecessary in this cause, but we are unable to perceive how it could have wrought any injury to the accused.

The second charge asked pretermits all inquiry as to venue. This, we suppose, was an oversight; but under a long and unbroken line of decisions in this court, that omission vitiates the charge.—*Bain v. The State*, 61 Ala. 75. The City Court erred in giving it.

Reversed and remanded. Let the accused remain in custody until discharged by due course of law.

## Harman v. The State.

### *Indictment for Carrying a Concealed Pistol.*

1. *Carrying concealed pistol; can not be carried within curtilage of defendant's abode.*—Under the provisions of the act of February 19th, 1881, amendatory of section 4109 of the Code, (Pamph. Acts 1880-1, p. 38), it is no defense to an indictment for carrying a pistol concealed about the person, that the defendant, at the time of the commission of the act, was within the curtilage of his own abode. No such exception is made by the statute.



[Jackson & Dean v. The State.]

APPEAL from Tallapoosa Circuit Court.

Tried before Hon. JAMES E. COBB.

At the fall term, 1881, of said court, Henry Harman was indicted for carrying a pistol concealed about his person; and at a subsequent term he was tried and convicted thereof. The evidence was uncontroverted that he carried the pistol concealed about his person, as charged, but it was shown that, at the time, he was within the curtilage of his place of abode. The defendant asked the court in writing to charge the jury as follows: "That if the evidence on behalf of the State only shows that the defendant was at his home and within the curtilage of his place of abode at the time the pistol was carried, then it is immaterial whether he carried it concealed or not, and they must find the defendant not guilty." The court refused to give the charge, and he excepted.

L. W. MARTIN, for appellant. (No brief came to the hands of the reporter).

H. C. TOMPKINS, Attorney-General, for the State, cited Acts of 1880-1, p. 38; *Owen v. The State*, 31 Ala. 387.

STONE, J.—The act to amend section 4109 of the Code, approved February 19th, 1881—Pamph. Acts 1880-1, 38—is plain and positive in its terms. It contains no exception in favor of persons within the curtilage of their own abodes. The charge asked was rightly refused.—*Owen v. The State*, 31 Ala. 387.

Affirmed.

## Jackson & Dean v. The State.

### *Indictment for Robbery.*

1. *Indictment for robbery; averment of value of property taken.*—An indictment for robbery that does not contain a distinct averment of the value of the property alleged to have been taken, is insufficient.

2. *Same.*—An averment in such an indictment charging that the defendant "feloniously took one valise containing clothing of the value of twenty dollars," is an averment that the taking was of the valise and of the clothing contained therein, and that the collective or aggregate value was twenty dollars.

3. *Admissibility of confessions.*—A confession by a defendant made in the absence of threats or promises, or other inducement to avow or disavow his guilt, is admissible, although it was made while the defendant

[Jackson &amp; Dean v. The State.]

was confined in prison, to an officer in charge of, and having authority over him, and in the absence of friends and counsel.

4. *Robbery; proof of value of property taken, when sufficient.*—On a trial for robbery it is not necessary to prove that the property alleged to have been taken, had a specific pecuniary value. It is sufficient that it was not worthless, that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, although its pecuniary value was nominal, insignificant, or incapable of estimation.

5. *Charge of the court; when should not be given.*—It is the duty of the court to avoid giving of its own motion, and to refuse to give at request of parties, any instruction tending to withdraw from the consideration of the jury, or to divert their attention away from any evidence of a material fact, or from which they could properly infer the existence of such fact.

6. *Robbery; what constitutes violence.*—While it may be true, that the mere stealthy taking, or the sudden, unexpected snatching of goods from the person of another, will not constitute robbery; yet, whenever the taking is resisted, and the resistance is overcome by violence, or whenever resistance is prevented by threats of actual violence, creating a reasonable apprehension of it, the offense is committed.

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

At the February term, 1882, of said court, an indictment in the form prescribed by the Code was found against the appellants and another, charging them with robbery. The appellants demurred to the indictment, and their demurrer having been overruled, they were tried on the plea of not guilty. The indictment and the points made by the demurrer are sufficiently set forth in the opinion. The only testimony introduced on the trial showing the circumstances attending the commission of the offense, was that of a boy about eleven years of age, named Joe Reese, from whose person the property is alleged to have been taken. This witness testified, that one night, prior to the finding of the indictment, as he was carrying the valise of Nathan Alexander from the depot to Alexander's room in the city of Montgomery, he was followed by three men, one of whom finally came up to him, and commenced a conversation with him about the valise, and asked his permission to carry the valise for him, stating that it was too heavy for him to carry; that witness let the man take the valise, and after having carried it about two blocks, on request of witness, the man returned the valise to him; that witness then carried the valise to within a short distance of Alexander's room, when the man "snatched hold of the valise and wrenched it from his hands by force," and that the man then put his hand in his pocket and "threatened witness"; and that the man then ran off carrying the valise, in company with the other two men, who had continued to follow witness, and who were very near him when the valise was "snatched" out of his hands. The witness failed to identify the appellants, but there was other evidence

[Jackson &amp; Dean v. The State.]

tending to show that they were two of the guilty parties. The evidence also showed that the valise contained clothing, and the valise and clothing were worth about twenty dollars. Testimony was also introduced on behalf of the State showing that the appellants, while they were in the guardhouse in the city of Montgomery, as prisoners, and in the absence of friends and counsel, confessed to the chief of police of said city, who had charge of, and authority over them, facts showing their complicity in the commission of the offense, but such confession was not introduced until after it had been shown to the court, that "no threats or promises were made or inducements held out to induce" the appellants to confess. The appellants objected to the introduction of the confession, but their objection was overruled, and they excepted. The appellants asked in writing, three charges, which are as follows: 1. "The indictment only charges the robbery of one of a valise, and the contents alleged is only matter of description of the valise, and the value alleged only applies to the contents; it is, therefore, necessary that the evidence should establish the fact, that the valise in question was of some value, and if the only evidence upon the point is, that the valise and contents were of value about twenty dollars, then the jury can not find that the valise was of any value; and if such be the case, they must acquit." 2. "It is necessary that the evidence should disclose, that the valise, the subject of the larceny, was of some value, and evidence that the valise and contents were of value about twenty dollars, is not, by itself, sufficient to show that the valise was of value." 3. "If the evidence fails to show beyond a reasonable doubt, that property was taken by violence to the person of Joe Reese, or by putting him in such fear as unwillingly to part with the same, they must acquit; and a snatching, without violence to the person is not, of itself, sufficient to constitute robbery." The court refused to give these charges, and the appellants separately and severally excepted. The jury returned a verdict of guilty against the appellants, fixing their punishment, upon which sentence was passed by the court.

J. A. MINNIS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The form of indictment for the offense of robbery, prescribed by the Code, following in this respect approved precedents at common law, contains a distinct averment of the value of the goods taken. Without such an averment an indictment for the offense would not be sufficient.



[Jackson &amp; Dean v. The State.]

The precise point of objection to the present indictment is, that it avers a taking of the valise only, and not a taking of the valise and clothing; and avers the value of the clothing, omitting to aver that the valise was of any value. The averment is in these words: "Feloniously took one valise containing clothing of the value of twenty dollars." This we construe as a charge, that the taking was of the valise holding clothing at the time of the taking, and it then holding the clothing, a taking of the clothing is included; and that the statement of the value is of the collective or aggregate value of the valise and clothing, not of the value of the clothing separately. An indictment for the larceny of several articles is sufficient, if the aggregate value is averred, though for reasons not of importance in cases of robbery, it is the better practice to allege the value of each article separately. In this view the indictment is sufficient, and the demurrer to it was properly overruled.

The confessions of the accused were shown to have been made in the absence of all threats or promises—of all inducements to either of them to avow, or disavow complicity in the offense, and were properly admitted as evidence. The fact that they were made while the accused were in prison to an officer having authority, may in the estimation of the jury have affected their credibility, without affecting their admissibility.

The first and second instructions to the jury, requested by the appellants, are founded on the same construction of the indictment as that on which the demurrer was based, and which we have declined to adopt. They are, however, clearly erroneous as propositions of law. It was not necessary, as these instructions import, that it should have been proved in every event, that the valise had any specific pecuniary value. If there was evidence showing that it was not worthless—that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, it was the subject of robbery, though the pecuniary value which could be imputed to it was nominal, insignificant, or incapable of estimation. Hence, if by putting in fear, or by actual violence to the person, a promissory note is extorted, this is not robbery, for the note is void; it is of no value to the wrong-doer, and of no detriment to him from whom it is forced. But taking by violence from the person of the prosecutor a slip of paper containing a memorandum of a sum of money, which was due or owing to him from another, is robbery. The paper was not evidence of the debt which could have been used against the debtor, but it was evidence that reminded the prosecutor of the existence and amount of the debt; and, as was said by the court, his keeping of it showed that he considered it of some value. The evidence in the present case, which these instructions had a tendency to

[Johnson v. The State.]

withdraw from the consideration of the jury, was, that the valise and clothing were of the collective value of twenty dollars, and further, that the valise was in the actual use of the owner to hold clothing. These certainly were facts tending to show that it was of value—that it was not worthless.

The third instruction ought not to have been given in view of the evidence. It is the duty of the court to avoid giving of its own motion any instruction having a tendency to withdraw from the consideration of the jury, or to direct their attention from any evidence of a material fact, or from which they could properly infer the existence of such fact. And it is equally the duty of the court to refuse an instruction requested having such tendency. If this instruction had been given, the attention of the jury, to say the least, would have been diverted from the only evidence upon the point on which it makes the case depend—the evidence of the witness from whom the valise was taken, that it was snatched hold of and wrenched from his hands by force, threats being uttered at the same time. It may be true, that the mere stealthy taking, or the sudden, unexpected snatching of goods from the person of another, will not constitute this offense. But whenever the taking is resisted, and the resistance is overcome by violence, the offense is committed.—2 Bish. Cr. Law, § 1167. Or if resistance is prevented by threats of actual violence, creating a reasonable apprehension of it, the offense is complete.—*Id.* § 1169. •

We can find no error in the record of prejudice to the appellants, and the judgment must be affirmed.

## Johnson v. The State.

### *Prosecution for an Assault and Battery.*

1. *Assault and battery; when doctrine of self-defense can not be invoked.* In a prosecution for assault and battery, the defendant can not invoke the doctrine of self-defense, where the evidence shows that he provoked and brought on the difficulty, and committed a battery on the prosecuting witness by placing a pistol against his chin in an angry and insulting manner.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a prosecution for an assault and battery commenced against the appellant in the County Court of said county, and resulting in the defendant's conviction in that court, was by

[Johnson v. The State.]

him taken, by appeal, to the Circuit Court, where, upon a trial had *de novo*, the defendant was again convicted. The principal witness examined by the State on the trial was Squire Howard, who testified, that on meeting the defendant on a public street in the City of Opelika, in March, 1881, the defendant commenced to curse him, and that after he had cursed him several times, the latter changed the ends of a small walking stick which he had in his hand, so as to grasp the small end, and put the large end upon the ground; that thereupon the defendant drew a pistol and presented it in witness' face, and laid it on witness' chin, cursing him at the same time, and that witness, in knocking the pistol up out of his face with his hand, caused it to strike his mouth, which bled from the contact. The defendant introduced the testimony of two witnesses, that of one tending to show that he saw the "entire transaction" and that the defendant did not touch Howard with the pistol or otherwise, and did not use the pistol in assaulting or attempting to assault him; but that Howard reversed the ends of a stick he had in his hand, and assumed a striking attitude before the defendant spoke to him in an angry manner. The testimony of defendant's other witness was, in substance, that he was present at the time of the difficulty between Howard and the defendant and was a witness to the transaction, and that he did not see the defendant assault or attempt to assault Howard.\* This being the substance of the evidence, the court, at the written request of the solicitor, charged the jury, that "they can look to all the evidence as to the deportment of Squire Howard and the defendant respectively at the beginning of the difficulty testified about, and if the evidence shows that, by opprobrious language and assuming a threatening attitude, the defendant gave reasonable cause to Howard to apprehend an attack, then Howard had a right to assume such a position as was necessary for self-defense; and if the defendant thus provoked the difficulty, he can not afterwards set up self-defense in justification, unless he showed a willingness to retire from the difficulty so brought on." To the giving of this charge the defendant excepted. The defendant then asked the court in writing to give the following charges: "1. If the jury believe from the evidence that the defendant presented the pistol, to prevent the prosecutor from using a stick on the person of defendant, and did not intend to use it, unless the prosecutor should attempt to use the stick on the person of defendant, then such presentation would not amount to an assault." 2. "If one witness swears to a fact, and two witnesses equally credible and having equal knowledge of the facts, testify to the contrary, then the testimony of the two witnesses must be believed in preference



[Redd v. The State.]

to the one witness." The court refused to give these charges, and the defendant separately excepted.

J. M. CHILTON and GEO. P. HARRISON, for appellant. (No brief came to hands of the reporter.)

H. C. TOMPKINS, Attorney-General, for the State.—(1). There can be no doubt of the correctness of the charge asked by the State and given by the court. The proof showed that the difficulty was provoked by defendant, and he could not therefore excuse himself by showing that the person assaulted was about to assault him.—*Riddle v. The State*, 49 Ala. 389; *Cross v. The State*, 63 Ala. 40. (2). The intention to use the pistol in the event the prosecutor struck defendant must necessarily be an assault in a case, where the defendant has done that which has a tendency to make the prosecutor strike him. For the use of unlawful force to prevent one from doing that which he has a right to do, is an assault.—*Stockton v. The State*, 25 Tex. 772; *Church v. The State*, 63 N. C. 15; *Rawles v. The State*, 65 N. C. 334; *Bloomer v. The State*, 3 Sneed, 66; 2 Whar. Am. Cr. Law, §§ 1243-5. (3). The second charge asked by defendant and refused by the court, was an invasion of the province of the jury, and, therefore, ought to have been refused.—*Corley v. The State*, 28 Ala. 22; *Addison v. The State*, 48 Ala. 478.

STONE, J.—If the testimony of Squire Howard was believed, the jury rightly found that the defendant provoked and brought on the difficulty, and that he committed a battery on the prosecuting witness, by placing a pistol against his chin in an angry and insulting manner. This disabled the defendant from invoking the doctrine of self-defense. See authorities on the brief of the Attorney-General. The rulings of the Circuit Court were in harmony with these views. There is nothing in the other question raised.

Affirmed.

## Redd v. The State.

### *Indictment for Murder.*

1. *Murder; sufficiency of indictment.*—An indictment charging that the defendant "unlawfully and with malice aforethought, did kill Lucy Lee by strangulation in this, to-wit, that he choked her to death," conforms substantially to the form prescribed by the Code, and is sufficiently

[Redd v. The State.]

definite as to the description of the means employed in perpetrating the killing.

2. *Organization of jury; when free from error.*—Where on the trial of a prisoner charged with murder, four of the regular jurors whose names were on the *venire* served on the prisoner, were then engaged as jurors in the trial of another cause, the circuit court did not err in ordering their names, when called, to be laid aside and the names of others to be drawn in their stead, nor in ordering an additional number to be summoned as talesmen, the whole *venire* having been exhausted before the completion of the jury, from whom the panel was completed, without waiting for the return of the jurors who were so detained on the other trial.

3. *Admissibility of confessions.*—Where a confession was made at a late hour of the night to the sheriff of the county by a prisoner, who was confined in jail on the charge of murder, and who had been advised that a mob was gathering in town to rescue him from jail, and who knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him "whether he was afraid of a mob," to which he replied in the negative, and to whom the sheriff himself, in the presence of a half dozen of the guards, had stated that he was "in a bad fix," and, in reply to a question put by the prisoner, had told him that "sometimes in cases of assault and battery and similar cases, it would be best to plead guilty,"—*held*, that such confession was obtained under the combined influence of both hope and fear and was inadmissible.

4. *Same.*—Another confession of a similar character made by the prisoner on the following morning to the jailor, when he went up to feed the prisoners, which seems to have been elicited by a question put by him to the prisoner, asking whether the prisoner had anything to say to him, is presumed to have originated from the same motives, and is inadmissible, in the absence of evidence showing, that the influence exerted upon the mind of the prisoner by the events of the previous night, had been removed.

5. *Whether confession voluntary or involuntary, a question for the court.* It is for the court to determine whether the confessions of a prisoner are voluntary or involuntary, and the court's decision of the question can not be reviewed by the jury. Hence, a charge is erroneous which submits to the jury the decision of this legal question, and should, for that reason, be refused.

6. *Weight of confessions; in determining, the jury may consider the circumstances under which they were obtained.*—But it is equally well settled, that after confessions in any case have been admitted, the jury may consider the circumstances under which they were obtained, and the appliances by which they were elicited, including the situation and mutual relation of the parties, in the exercise of their exclusive prerogative of determining the credibility of the evidence, and the weight to which it is properly entitled in controlling the formation of the verdict.

#### APPEAL from Russell Circuit Court.

Tried before Hon. H. D. CLAYTON.

At the fall term, 1881, of said court, John Redd, the appellant, was indicted and tried for the murder of one Lucy Lee, and was convicted of murder in the first degree, and in accordance with the verdict of the jury, he was sentenced to be hanged. From this judgment he took an appeal to this court, and on the hearing of that appeal, at a former day of this term, the judgment of the lower court was reversed and the cause remanded. *Redd v. The State*, 68 Ala. 492. After the remandment of the cause, the defendant was again tried, convicted and sentenced

[Redd v. The State.]

to suffer the death penalty; and from the judgment then rendered the present appeal was taken. Two questions were reserved on the organization of the jury, but the facts relating thereto are stated in the opinion.

On the trial, it was shown that the body of the deceased was found at the bottom of a well soon after she had been missed, and evidence was introduced tending to show that she had been killed and her body thrown into the well, and that the defendant was the guilty agent. The State then examined as a witness the jailor, who had charge of the jail in which the defendant was then confined, who testified, in substance, that on the Sunday morning after the alleged killing, he went into the jail to feed the prisoners, and seeing the defendant looking at him, said to him, "John, have you any thing to say to me," to which the defendant replied, "what about—that girl," and on witness replying in the affirmative, and without making any threats or offering any inducements to elicit any confession from the defendant, and without doing any thing tending thereto, except to ask the question above quoted, the defendant confessed that he killed the deceased by choking her, and threw her body into the well. On the question of the admissibility of this confession, it was shown that on the day before the above conversation was had, a mob of about one hundred and fifty persons had assembled about three quarters of a mile from the jail in which the defendant was confined, for the alleged purpose of lynching the defendant; that of this mob twenty or more assembled in the town of Seale, in which the jail is located, on the night before said conversation was had, and that both of these assemblages had been dispersed by the sheriff by remonstrances, appeals and assurances, that the defendant should be safely kept and tried; that the defendant knew of the gathering of the mob; that on the night before the conversation was had, the sheriff had caused eight or ten persons to come to the jail for the purpose of guarding it; that about eleven o'clock that night the sheriff and five or six of the guards went to see the defendant and had some talk with him, when one of them asked the defendant if he was afraid of a mob, to which the defendant replied in the negative; that the sheriff, in reply to some questions asked him by the defendant, told him that he was in a bad fix; that "sometimes in cases of assault and battery and similar cases, it was best to plead guilty." It was then shown by the State, that the defendant, on that night and immediately after the foregoing conversation with the sheriff, confessed to him that he killed the deceased, stating some of the details connected with the crime. As recited in the bill of exceptions, "each witness who testified to confessions was first examined by the solicitor as to the circumstances of the confes-



[Redd v. The State.]

sions, and testified that nothing was said or done, exciting hope or fear, to induce the confessions, and on the evidence the court decided, that they were made freely and voluntarily and without constraint," overruled the defendant's separate objections to each confession, and allowed both of them to go to the jury as evidence, and also overruled motions of defendant to exclude the confessions from the jury, separately made, and to each of these rulings of the court the defendant separately excepted.

The court, on the written request of the solicitor, charged the jury, that "the question of the admissibility of confessions is purely a question of law for the court to decide, and when admitted by the court, the jury are bound to regard them as a part of the evidence in the case," and the defendant excepted. The defendant asked the court in writing to charge the jury, among other things, as follows: "7. If the jury believe from the evidence that the defendant made any confessions, they may look to all the circumstances attending such confessions, such as the situation of the parties and their relations one to the other, in determining the truth or falsity of the confessions, or whether the confessions were made voluntarily or not." The court refused to give the charge as a whole, but gave all of it except the words, "or whether the confessions were made voluntarily or not," and the defendant excepted. Other exceptions were reserved by the defendant, but as they are not passed upon by the court, they need not be here stated.

L. W. MARTIN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The indictment in this case is for murder, and charges that the defendant "unlawfully and with malice aforethought, did kill Lucy Lee by *strangulation*, in this, *to-wit*, that *he choked her to death*." When the case was last here on appeal, it was ruled, that the indictment conformed substantially to the form prescribed by the Code, and was sufficiently definite as to the description of the means employed in perpetrating the killing. To this view we still adhere.—*Redd v. The State*, 68 Ala. 492; Code of 1876, p. 991, Form 2.

The question raised on the organization of the jury was decided adversely to appellant in *Kimbrough v. The State*, 62 Ala. 248. It was there held, that in cases where some of the regular jurors, constituting a part of the *venire* served on the prisoner, were necessarily detained because engaged in the trial of another cause, and their names were drawn in the progress of

[Redd v. The State.]

the trial at bar, it was not error in the court to order their names to be laid aside and for others to be drawn in their stead. It was never intended that the dispatch of judicial business should be thus impeded.

So likewise, on the authority of the case last cited, where the whole *venire* had been exhausted before the completion of the jury, and prior to the return of the absent or detained jurors, we hold that there was no error in the action of the court ordering an additional number to be summoned from the proper class of persons to complete the jury.

The more modern rule, in reference to extra-judicial confessions made by persons charged with crime, has never prevailed in this State, holding, that, in order to justify their exclusion from evidence, they must have been induced by a *positive promise* made or sanctioned by a person in authority—an officer of the law.—Whart. Cr. Ev. 651. The settled rule of this court is, that all such confessions are *prima facie* involuntary, and they can be rendered admissible only by showing that they are voluntary and not constrained—or, in other words, free from the influence of *fear* or *hope*, applied to the prisoner's mind by a third person.—*Murphy v. The State*, 63 Ala. 1; *Johnson v. The State*, 59 Ala. 37; *Porter v. The State*, 55 Ala. 95; Clark's Man. Cr. Law, § 2480; Clark's Cr. Dig. § 326; 1 Brick. Dig. p. 509, § 859. It is no sufficient objection that they are elicited by mere adjurations to speak the truth, for this may be properly construed as advice to assert *innocence*, as well as to confess *guilt*.—*Aaron v. The State*, 37 Ala. 106; *King's case*, 40 Ala. 314; Whart. Cr. Ev. §§ 647, 672. Nor are confessions rendered inadmissible by the mere fact of being made to sheriffs, constables, jailors, or other officers of the law having the legal custody of the prisoner.—*Aaron's case*, *supra*; Whart. Cr. Ev. §§ 647, 649. The true test is, whether, under all the surrounding circumstances, they have been induced by a threat or promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor. If so, whether true or false, such confessions must be excluded from the consideration of the jury as having been procured by undue influence.—Whart. Cr. Ev. § 673; *Porter v. The State*, 55 Ala. 95. And it has generally been held, as said by Mr. Wharton, that "any advice to a prisoner by a person in authority, telling him it *would be better for him to confess*, vitiates a confession induced by it," and he cites numerous authorities in support of this view.—Whart. Cr. Ev. §§ 651, 674; *Ree v. Drew*, 8 C. & P. 140; *State v. York*, 37 N. H. 175; *Vaughan v. Com.*, 17 Grat. 576; *People v. Robertson*, 1 Wheeler's Cr. Cases, 67; *Porter's case*, 55 Ala. 95, *supra*; 1 Greenl. Ev. §§ 219–220.

So when a confession has been once obtained through the

[Redd v. The State.]

influence of hope or fear, confessions of a similar character subsequently made, as is uniformly held, may be inferred to have originated from the same motive, and in the absence of evidence to the contrary showing that the original influence had ceased, or been dispelled, they are inadmissible.—Whart. Cr. Ev. § 677; *Ward v. The State*, 50 Ala. 120; *Bob v. The State*, 32 Ala. 560; Clark's Man. Cr. Law, § 2480; *Porter's case*, (*supra*), 55 Ala. 95; 1 Greenl. Ev. § 221.

In the light of the above principles, the confessions made by the prisoner to Ferrell, the sheriff, should have been excluded from the jury. They seem to have been made at a late hour of the night, while the defendant was in custody, and to an officer of the law. The prisoner had been advised of the fact that a mob was gathering in town for the purpose of rescuing him from the jail where he was confined. He knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him "whether he was *afraid of a mob*," to which he had replied in the negative. The sheriff himself, in presence of a half dozen of the guards, informed him that he was in a *bad fix*," and in reply to a question put by the prisoner, had told him that sometimes, in cases of assault and battery *and similar cases*, it was *best to plead guilty*." Thereupon followed the confessions to which objection was taken. They were obtained, we think, under the combined influence of both *hope* and *fear*, and were improperly admitted.

Next morning other confessions of a similar character were made to the jailer, Tucker, when he went up to feed the prisoners, which seem to have been elicited by a question put by him to the prisoner, asking whether he (the prisoner) had anything to say to him (Tucker). There is no evidence tending to prove that the influence exerted upon the mind of the prisoner by the events of the previous night had been removed. These confessions were, in our judgment, also improperly admitted.

It is a well established maxim of the law, that the *admissibility* of evidence is always a question to be determined by the court, and its *weight* or *credibility* is for the determination of the jury. It is for the court, therefore, to say whether the confessions of a prisoner are *voluntary* or *involuntary*, and this question being judicially settled can not be reviewed by the jury. Hence a charge is erroneous which submits to them the decision of this legal question, and should, for that reason, be refused. The seventh charge requested by the prisoner was liable to this objection.—*Bob v. The State*, 32 Ala. 560; *Matthew's case*, 55 Ala. 65.

There is no conflict whatever between this principle and the further one, which is equally well settled, that after the con-



[Leigh v. The State, ex rel. O'Bannon.]

fessions, in a given case, have been admitted, the jury may consider the circumstances under which the confessions were obtained, and the appliances by which they were elicited, including the situation and mutual relation of the parties, in exercising their exclusive prerogative of determining the credibility of the evidence, or the weight to which it is properly entitled in controlling the formation of the verdict.—*Brister's case*, 26 Ala. 107; *Matthews v. The State*, 55 Ala. 65.

For the error of the court in admitting the confessions of the prisoner made both to Ferrell and to Tucker, its judgment is reversed and the cause remanded.

In the meanwhile an order will be made that the prisoner be held in legal custody until discharged by due course of law.

## Leigh v. The State, ex rel. O'Bannon.

*Application for Mandamus to Contest Election held to locate County Site.*

1. *Supervisors of election; their powers and duties.*—The board of supervisors under the election law (Code of 1876, § 292) have no revisory powers, but their duties are purely ministerial and are confined to mere computation. They are governed by the returns made by the inspectors of the several precincts as to the number of votes cast, and for whom cast; and if these returns be in form, they have no power to go behind them and ascertain the qualifications of the voters; but they must add together the votes of the several precincts cast for each candidate, as the same are shown in the certified returns, and declare the result; and the declaration of the result made by them establishes a *prima facie* case of election.

2. *Provisions for contest in general election law; when applicable.*—The act of the General Assembly, approved February 18th, 1881 (Pamph. Acts, 1880–81, p. 220), authorizing an election for the purpose of permanently locating the county site of Escambia county, makes no provision for a contest of the election to be held thereunder; and as the provisions of the general election law regulating contests of election (Code, 1876. §§ 302–41), being confined to election of persons to office, are not applicable, there is no provision made by the statutes for a contest of such an election.

3. *Mandamus; how affected by statute.*—*Mandamus* as a remedial process, remains as it was at common law, a writ for the enforcement of a clear legal right, for which there is no other adequate legal remedy, except that the statutes (Code of 1876, § 3601; Pamph. Acts, 1878–9, p. 150), have provided authority to controvert the truth of the return, and the machinery therefor. The purpose of these statutes was not to enlarge the scope of the operation of the writ, but merely to cure the delay consequent on the want of authority to controvert the return to the rule *nisi*.

4. *Same; to contest the declared result of an election, not within the scope of its operation.*—The result of an election held under an act of the General Assembly, authorizing an election for the purpose of permanently locating the county site of Escambia county, as declared by the

[Leigh v. The State, ex rel. O'Bannon.]

board of supervisors, can not be contested by *mandamus*, although no other remedy is provided by law for such a contest.

5. *Quo warranto* ; when not a remedy to contest an election.—The result of such an election, so declared, can not be contested by *quo warranto*, or by the statutory proceedings in the nature of a *quo warranto*.

APPEAL from Escambia Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

The petition in this cause was filed in the name of the State of Alabama, by W. J. O'Bannon, E. T. Brewton and others, citizens and legal voters of Escambia County, against N. R. Leigh, John Rupert and James H. Green, the probate judge, clerk of the circuit court, and sheriff of said county, alleging that under and in pursuance of an act of the General Assembly, approved February 18, 1881, and the order of the sheriff of said county made as directed by said act, an election was held in said county on the 12th day of April, 1881, for the purpose of permanently locating the county site thereof; that on the 16th of April, 1881, respondents met at the court house of said county and counted the votes cast at said election; that the probate judge, N. R. Leigh, and the clerk of the circuit court, John Rupert, made out and forwarded to the Secretary of State a certificate to the effect that Pollard had received a majority of the votes cast at the election; and that the sheriff, James H. Green, made out and forwarded to the Secretary of State a certificate to the effect, that Brewton had received a majority of the votes cast at the election; that "gross, palpable and glaring frauds" were committed at said election in the interest of Pollard, an account of which is given in considerable detail; that, in fact, the town of Brewton received the majority of the votes cast; that the relators had made a demand of the respondents, that they remove their respective offices and the books and papers pertaining thereto to Brewton, but that they had refused and failed to do so. A writ of *mandamus* was prayed to compel the respondents to remove their offices and the books, records and papers pertaining to their respective offices from Pollard to Brewton; and that they be required to keep their offices, and to transact their official business at Brewton. An alternative writ was issued in accordance with the prayer of the petition. The respondents, Leigh and Rupert, moved to quash the writ and petition. Their motion was overruled by the court, and they excepted. They then demurred to the petition, and their demurrer was also overruled. They then filed an answer; and upon the issue of fact thus made, the cause was tried. From the view taken of the cause by this court, it is unnecessary to set out the defense made by the answer, or the evidence introduced on the trial. The court determined and adjudged from the evidence, that, at said election, Brewton received the

[Leigh v. The State, ex rel. O'Bannon.]

majority of the legal votes cast, and was the county site of said county, and rendered judgment awarding a peremptory writ of *mandamus*, as prayed for in the petition; and from this judgment the said respondents appealed. The overruling the motion to quash, and of the demurrer, and the final judgment of the Circuit Court, are here assigned as error.

GAMBLE & PADGETT and STALLWORTH & BURNETT, for appellants.—(1). *Mandamus* will not lie when there is any other legal remedy.—*Ex parte Harris*, 52 Ala. 87; *Ex parte Thompson*, 52 Ala. 98; *Mead v. Dean*, Minor, 46; 2 Brick. Digest, p. 240, § 4; *Thomason v. The Justices*, 3 Humph. 233; High on Ex. Remedies, §§ 49–77, 18 and 19 and note. (2). There must also be a clear legal right.—*Ex parte Harris, supra*; *Ex parte Thompson, supra*; *Ex parte Echols*, 39 Ala. 698; *U. S. v. Seaman*, 17 How. 225; High on Ex. Remedies, §§ 33–39; 6 Texas, 457; 3 Texas, 88; McCrary on Elections, § 316. (3). The relators had a clear legal remedy, to-wit, *quo warranto*.—*Echols v. Dunbar*, 56 Ala. 131; *Clarke v. Jack*, 60 Ala. 271; High on Ex. Remedies, §§ 620, 57; McCrary on Elections, §§ 320, 331–3; 5 Hill, 616; 15 Minn. 455. (4). The board of supervisors acted as judges or *quasi* judges, and not as ministerial officers, and *mandamus* will not lie to reverse their former finding, however erroneous it may be. So long as the declared result of the supervisors stands, it can not be disregarded, unless absolutely void, which is not the case. The supervisors having declared that Pollard received the majority of the votes cast, it would have been unlawful for the respondents to have removed their offices to Brewton; and *mandamus* would not lie to compel them to do an unlawful act.

DAVID CLOPTON and J. WHITEHEAD, *contra*.—(1). The act of February 18, 1881, makes no provision for a contest of the election therein provided for, and the provisions of the general election law relating to contested elections, relate only to “the election of persons declared elected to any office.”—*Clarke v. Jack*, 60 Ala. 271. (2). When there are common law modes of determining contested elections, and the statute providing for the election, does not inhibit a resort to the common law modes, they may be resorted to in cases for which no statutory contest is provided.—*Echols v. State, ex rel.* 56 Ala. 131. (3). The common law mode of contesting an election for the location of the county site, is *mandamus* to compel the officers to remove their offices, records, etc.—High on Ex. Remedies, § 79; *State ex rel. v. Marston*, 6 Kansas, 536; *State ex rel. v. Sarton*, 11 Wis. 27; *County of Calaveras v. Brockway*, 30 Cal. 325. (4). *Quo warranto* is the common law mode of trying the right



[Leigh v. The State, ex rel. O'Bannon.]

*of a person to an office*; but it is not the common law mode in such cases as the present. It does not dictate the performance of official duties, or the place or manner where, or in which they shall be performed, but inquires *into the right to perform them any where or in any manner*. It never runs to the defendants *as officers*, but *as persons*.—High on Ex. Remedies, §§ 604, 618. Besides the judgment on *quo warranto* would be ineffectual. The judgment is one of seizure, or ouster, or both. If a judgment could be rendered ousting the respondents from performing the official duties at Pollard, no judgment could be rendered commanding them to perform them *at Brewton*. High on Ex. Remedies, § 745. (5). Whenever a duty is devolved upon a public officer by law, which is ministerial, and as to which he has no discretion, *mandamus* to compel the performance of that duty has ever been recognized as the proper proceeding.—High on Ex. Remedies, §§ 31, 32, 80; *Ex parte Echols*, 39 Ala. 698; *Tenn. & Coosa R. R. Co. v. Moore*, 36 Ala. 380; *Commonwealth v Commissioners, etc.*, 37 Penn. St. 277. (6). It is manifest from the foregoing, that there is no adequate remedy; and hence is applicable the general rule, that *mandamus* will lie, where there is a clear right, and no adequate, specific remedy.

STONE, J.—By act, approved February 18th, 1881,—Pamph. Acts, 220—the qualified electors of Escambia county were “authorized to permanently locate the county site of said county by ballot.” For the purpose of carrying into effect the provisions of the act, the sheriff of the county was directed to order an election to be held within sixty days after its passage, “said election to be governed, in every particular, by the election laws now in force, and the place receiving the largest number of votes shall be declared the county site of said county.” It will be observed that the provisions of this statute are very brief, and it omits all details for conducting and declaring the election. It is to be governed, in every particular, by the election laws *now* in force. The election laws then and now in force declare who are qualified electors, and prescribe in what manner voters shall take the registration oath, and be registered; they also provide for the appointment of inspectors, clerks and a returning officer for each voting precinct. Only the persons who have the requisite qualifications of age, residence in the State, county and precinct, and who have been registered according to law, have the legal right to vote. The inspectors are furnished with a copy of the registration list for their precinct, and, on question raised, it is their duty to determine in the first instance who are qualified electors. They also count out the votes cast, ascertain the number of votes cast at their

[Leigh v. The State, ex rel. O'Bannon.]

box for each candidate, certify the result, and seal up the same, together with one of the poll lists certified, and a list of the registered voters in the precinct, and forward the same by the returning officer to the sheriff of the county.—Code of 1876, §§ 285-6-7.

Section 291 of the Code is in the following language: "On Saturday next after the election, at the hour of 12, meridian, the returning officer of the county, in person or by deputy, and the probate judge and clerk of the circuit court shall assemble at the court house, . . . and it shall be the duty of this board of supervisors, so constituted, to make a correct statement from the returns of the votes from the several precincts of the county, of the whole number of votes given therein for each office, and the person to whom such votes were given" Section 292: "After such statement is made, the board shall make certificates, on blanks furnished by the secretary of state, of the exact number of votes cast in their county for each person, stating the office such person is voted for, deliver the same to the judge of probate of the county," etc. It will be seen that the returning officer (who is usually the sheriff or his deputy), the judge of probate and the clerk of the circuit court, unless one or more of them fails to attend, or was a candidate at the election, constitute the board of supervisors. Their duties are defined. They must make "a correct statement from the returns of the votes from the several precincts." Their duties are purely ministerial—confined to mere computation. Though called supervisors in the statute, they have no revising powers. They are governed by the returns made by the inspectors of the several precincts, as to the number of votes cast, and for whom cast. If these be in form, the supervisors have no power to go behind them and ascertain the qualifications of the voters. They add together the several votes of the several precincts cast for each candidate, as the same are shown in the certified returns of the inspectors, and declare the result. This is a mere matter of arithmetic, and constitutes the supervisors mere canvassers.—*Hudman v. Slaughter*, at the present term. It is manifest that in the election under discussion, the supervisors were clothed with no power to hear and determine complaints of illegal registration, or illegal voting. We think it equally clear that it was alike their function and duty to declare the result, and that such declaration by them establishes a *prima facie* case of election.—*Echols v. The State, ex rel. Dunbar*, 56 Ala. 131.

The general election law of this State provides for a contest of elections. See Code of 1876, § 302, *et seq.* In *Clarke v. Jack*, 60 Ala. 271, we decided that our statutes makes no provision for a contest, in an election such as this. We adhere to

[Leigh v. The State, ex rel. O'Bannon.]

that view. In *Echols v. The State, ex rel. supra*, we ruled that *quo warranto* was the usual method of contesting the right to an office, when the statutes make no provision for a contest. We are satisfied that the declared result of the present election can not be contested by *quo warranto*, nor by our statutory proceedings in the nature of a *quo warranto*.—Code of 1876, § 3419, *et seq.* Our statutory system, and the common law writ, its prototype, have ordinarily but two functions; and the writ runs only against a natural person, or collection of natural persons. It inquires by what right the person proceeded against exercises official authority, and it determines the question of his right to exercise such authority. And it inquires by what right any number of persons, one or more, exercise or enjoy a franchise, and determines that right. The judgment either quashes, or what is the same thing, dismisses the information, or it ousts from the office or franchise. “It can afford no relief for official misconduct, and can not be employed to test the legality of the official action of public or corporate officers.”—High, Extr. Leg. Rem. § 618. We have thus reached the conclusion that our statutes furnish no means of contesting the election of county site of Escambia county, and that it can not be tried on an information in the nature of a *quo warranto*.

*Mandamus* was originally a prerogative writ, issuing out of the Court of King's Bench in England, and, by construction, it was a command from the King himself, who was constructively present in that court. It issued alone from that court, for that court alone represented the ideal presence of the sovereignty.—3 Bl. Com. 110. In this country it can scarcely be called a prerogative writ. It is strictly a civil proceeding, and may be called a supplementary remedy, when the party has a clear right, and no other appropriate redress, to prevent a failure of justice.—Bouv. Dic.; *Un. Pac. R. R. Co. v. Hall*, 91 U. S. 343; *Moses on Mandamus*, 16, 17; 4 Wait, Actions and Defences, 357. In this State, to authorize the grant of this writ, there must be shown a clear, specific legal right, and no other adequate legal remedy.—2 Brick. Dig. 240, §§ 4, 5; *State ex rel. v. Brewer*, 61 Ala. 318; *Ex parte Schmidt*, 62 Ala. 252.

Under our statutes and rulings, there was no mode provided for controverting the truth of the return to a *mandamus nisi*, until February 26th, 1876. The return, true or false, was final for that proceeding; and the only remedy the relator had was a suit for the false return.—*Commissioners Court v. Tarver*, 21 Ala. 661; S. C. 29 Ala. 414. By act, approved February 26th, 1876—Pamph Acts, 207; Code of 1876, § 3601—it was provided that “the truth or sufficiency of the facts or matters set forth in the answer or return in *man-*



[Leigh v. The State, ex rel. O'Bannon.]

*damus* cases, may be controverted and put in issue, and either of the parties to the cause shall have the right to demur to any pleading in the cause, or reply as many matters as may be necessary to the full and complete assertion of all his lawful and just rights in the cause, in the same manner and to the same extent as in any other civil action." There was another and fuller statute on the same subject, approved February 12th, 1879—Pamph. Acts, 150. While the later enactment provided expressly for amendments, revivor, bill of exceptions, and appeal to the Supreme Court, it did not enlarge the area of the operation of the writ, or of the grounds of contesting the return or answer. And by the ninth section it declared: "That it is not the intention of this statute to repeal the common law, as now in force in this State, in reference to any of the matters embraced in this act, but to leave the same in full force, it being the true intent and meaning of this statute to provide a more speedy, plain and less expensive mode of procedure in all cases to which it shall apply." From these principles we think it results that, with the exception of the authority to controvert the truth of the return, and the machinery therefor provided by the statutes, *mandamus*, as a remedial process, remains as it was at common law; a writ for the enforcement of a clear legal right, for which there is no other adequate legal remedy.—*People v. Stevens*, 5 Hill (N. Y.) 616; *Bonner v. State*, 7 Ga. 473; *People v. Detroit*, 18 Mich. 338; *People v. Corporation*, 3 Johns. Ca. 79; *People v. Supervisors*, 18 Abb. Pr. 8; *State v. Jacobus*, 26 N. J. L. 135; *State v. Warren*, 32 N. J. L. 439; *People v. Head*, 25 Ill. 325; *People v. Kilduff*, 15 Ill. 492; *Banton v. Wilson*, 4 Tex. 400; *Com. v. Sel. & Com. Council*, 34 Penn. St. 496; *State ex rel. v. Co. Judge*, 7 Iowa, 186; *State ex rel. v. Mosley*, 34 Mo. 375; 4 Wait, Ac. and Def. 368.

The present proceeding was instituted to compel the county officers of Escambia County to establish and keep their offices at Brewton instead of Pollard, where they are now kept. Their right to remain at Pollard, or to remove to Brewton, depends on the result of the election held to establish the county site. The supervisors, in computing the number of votes cast for each place, as shown by the certified returns of the inspectors of the several precincts, ascertained that a majority of the votes had been cast for Pollard. Being mere canvassers, and having no authority to go behind the certified returns, or to institute inquiry into the qualifications of the electors, the result was a mere matter of calculation. That ascertained result was the *statement* the law required them to certify to, and when certified it established the *prima facie* right of the place thus having a majority of the votes, to be treated and regarded as the elected court

[Leigh v. The State, ex rel. O'Bannon.]

house. We do not understand the information filed in this case, as denying that the certified returns of the precinct inspectors show a majority of votes cast for Pollard. The return to the rule to show cause issued in this case, shows such to have been the case. That being so, the respondents had no option. They were bound to answer truly, and so answering, they returned that the supervisors had declared the election in favor of Pollard. In the absence of our statutes above referred to, if that return had been made, it would have been a full answer to the rule *nisi*, and peremptory *mandamus* would have been refused. The relators could have had but one remedy—a suit against the respondents for a false return. If they had brought such suit, they must needs have failed, for they could not have shown that the return was false. It was true, and the only proper return they could have made. Have our statutes enlarged the operation of the writ of *mandamus*? Can it administer relief in matters theretofore without its scope? The statutes indicate no such purpose. They show, alike in their captions and in the body of them, that their purpose was to cure the delay, consequent on the want of authority to controvert the return to the rule *nisi*. They enable suitors to determine in one action, what theretofore frequently required two. We do not think they had a broader aim, or can receive a larger interpretation. They furnish no authority whatever for going behind the answer or return, and, leaping over the matter of the return, entering upon the trial of a contested election. Such contest would be beyond the scope of a *mandamus*, as always understood and administered in this State, and is equally without the purview of a controverted return. It would, in the name and form of a proceeding to compel the county officers to keep their offices at the court house, be, in substance, a hotly contested suit, to determine which of two places was and is the lawfully elected court house town. This would be to dwarf out of sight the simple issue ostensibly presented by the pleadings, in the magnitude and intricacy of the incidental inquiry, the necessities of the relief prayed make an indispensable condition precedent.—*The State ex rel. Pinney v. Williams*, at the present term.

Some rulings have been made in opposition to these views. *State ex rel. v. Marston*, 6 Kans. 524; *State ex rel. v. Saxton*, 11 Wis. 27; *County of Calaveras v. Brockway*, 30 Cal. 325. We know not under what statutory systems those decisions were made. They are not reconcilable with the uniform rulings of this court, nor with what we understand to be the function and power of a writ of *mandamus*. We are aware that in thus ruling, we leave the relators without remedy. This we regret, as the testimony tends strongly to show gross irregular-

[Taylor, Adm'r, v. Robinson, Adm'rx.]

ities in the election. We think the proof justified the finding of the Circuit Court, that Brewton received a majority of the legal votes cast; still we think the law is powerless to redress the wrong.—*O'Docherty v. Archer*, 9 Tex. 295. Better that fraud should go unpunished, than that the landmarks of the law should be obliterated or obscured.

The judgment of the Circuit Court is reversed, and, proceeding to render the judgment the Circuit Court should have rendered, this court doth order and adjudge that the information be dismissed at the costs of the relators, both in the court below and in this court.

## **Taylor, Adm'r, v. Robinson, Adm'rx.**

*Bill in Equity by Legatees to recover for Devastavit committed by Administrator of their Testator.*

1. *Statute of non-claim; operation against claim of heirs or legatees.* The claim of heirs or legatees against the estate of a deceased administrator, for a *devastavit* committed by him, is barred by the statute of non-claim, unless presented to the personal representative of such administrator, within eighteen months after the grant of letters, or after the accrual of the claim; or, where minors are concerned, within eighteen months after they attain their majority.

2. *Same; fraud and fraudulent concealment no exception.*—Fraud and fraudulent concealment on the part of the deceased, in reference to the *devastavit*, create no exception against the operation of the statute of non-claim.

3. *Rule as to recovery.*—The rule is well settled in equity, that all the parties complainant, who join in a suit, must be entitled to recover, or none can. The failure of one is the failure of all.

APPEAL from the Chancery Court of Madison.

Heard before Hon. H. C. SPEAKE.

The original bill in this cause was filed on the 12th of May, 1868, by Morris K. Taylor, as the administrator *de bonis non* of the estate of Byrd Brandon, deceased, and John D. Brandon, Lucy A. Houghton, and Eliza R. Seelye, heirs and legatees of Byrd Brandon, against Caroline Robinson as the administratrix of William Robinson, deceased, for the purpose stated in the opinion. Byrd Brandon died in this State, leaving a will, on the 2d of June, 1838. At the time of his death, the above named legatees were minors, the youngest of whom, John D. Brandon, attained his majority on the 18th of December, 1858.

After an administration in chief, and on the 12th of October, 1840, William Robinson as sheriff was appointed administrator



[Taylor, Adm'r, v. Robinson, Adm'rx.]

*de bonis non* of the estate of Byrd Brandon, and he continued to act as such administrator under this appointment until the 13th of December, 1843, when his term of office as sheriff expired. He was re-appointed administrator of said estate on the 22d of April, 1844, and continued to act as such administrator until the time of his death, which occurred on the 3d of July, 1852. On the 21st of July, 1852, John Robinson and James Robinson were appointed administrators of the estate of William Robinson, deceased, and continued to act as such administrators until December 13th, 1858, when they resigned, and the appellee was appointed to succeed them. No settlement was ever made by John Robinson and James Robinson, or by appellee, of the administration of their intestate upon the estate of Byrd Brandon.

The complainants, in their original bill, after averring fraud and mismanagement by William Robinson while he was administrator of Byrd Brandon, allege that said legatees were for many years after the death of their testator non-residents of this State, and were thereby prevented from discovering the frauds alleged against William Robinson; that by reason of his frauds, gross negligence and mismanagement in and about the administration of said estate, they were deprived of all means to prosecute their claim; and that the facts relied on by them to establish his fraud were by them discovered within the year preceding the filing of the bill, and that "they have exercised all the conscience, good faith and diligence to prosecute their rights that the peculiar circumstances attending the case would allow."

In the spring of 1875, the appellants amended their bill, and averred a presentation of the claim of said legatees to the administrators of William Robinson, and a demand of them for a settlement of the administration of William Robinson upon the estate of their father, "in the year 1856, or 1857, or 1858, the exact time not remembered, but before the said John D. Brandon arrived at the age of twenty-one years, and while James Robinson and John Robinson were administrators" of said estate, and a refusal on their part to make such settlement.

The appellee answered the bill, denying all fraud and mismanagement charged to have been committed by her intestate; and incorporated in her answer a plea, that appellants' cause of action was barred by the statute of non-claim.

There was evidence tending to show, that John D. Brandon, within eighteen months after he attained his majority, for himself and the other legatees, did present their claim to the administrators of William Robinson and demand a settlement of their administration upon their testator's estate; but that this was done more than eighteen months after the accrual of said

[Taylor, Adm'r, v. Robinson, Adm'rx.]

claim and after the other legatees attained their respective majorities.

On the hearing, had upon pleadings and proof, the chancellor sustained the plea of the statute of non-claim, and dismissed the bill. That decree is here assigned as error.

JOHN D. BRANDON, for appellants. (No brief came to hands of reporter.)

L. P. WALKER, *contra*, after an elaborate argument of other questions raised by the record, but not passed on by the court, contended, that Robinson's *devastavit* was a claim against his estate, within the meaning of the statute of non-claim; and not having been presented, as required by the statute, it is barred, citing *Fretwell v. McLemore*, 52 Ala. 124; *McDowell v. Jones*, 58 Ala. 25.

SOMERVILLE, J.—The purpose of the bill filed by the appellants is to charge the estate of William Robinson, deceased, with a *devastavit* alleged to have been committed by him as administrator in the management of the estate of Byrd Brandon, of which the appellant Taylor is administrator *de bonis non* with the will annexed. The other complainants, who unite with Taylor as co-complainants in the bill, were legatees under the said will. William Robinson died in the year 1852, during which year John and James Robinson were appointed his administrators, and after acting in that capacity over six years, they resigned in December, 1858, when the appellee was immediately appointed to succeed them.

The first question is, whether this claim for a *devastavit* is within the operation of the statute of non-claim, as against the legatees or heirs who are seeking by bill to enforce distribution. The chancellor so held, sustained the plea of the statute of non-claim, and dismissed the bill. It is our judgment that his decision is free from error.

The case of *Fretwell v. McLemore*, 52 Ala. 124, seems conclusive of the question. It was there held, in an action by certain heirs against the estate of a surety, that a claim growing out of the misfeasance or malfeasance of his principal, whether judicially ascertained or not, would be barred by the statute of non-claim, unless presented to the administrator of the surety within the period of eighteen months. It was also ruled, in the same case, that the claim of "*heirs or legatees claiming as such*," which is excepted from the statute of non-claim by section 2598 of the Code, is the claim of title to the *specific property* of the estate in the hands of the administrator, *unadministered and unconverted*, and that the exception has no reference to a pecu-

[Taylor, Adm'r, v. Robinson, Adm'rx.]

niary demand created by a *devastavit*, or to a default of the administrator creating the mere relation of debtor and creditor. This case is so well reasoned that we can add nothing to the argument, and it has been repeatedly approved by this court. *McDowell v. Jones*, 58 Ala. 25; *Owen v. Corbitt*, 57 Ala. 92; *Foster v. Holland*, 56 Ala. 474. The case of *Harrison v. Harrison*, 39 Ala. 489, maintaining the contrary doctrine, was, in our opinion, unsound in principle, and was properly overruled.

The claim here sought to be enforced was not presented against the estate of William Robinson within the time prescribed by the statute, which is required to be within eighteen months after the grant of letters of administration, or after the accrual of the claim; or, where minors are concerned, within eighteen months after the removal of their respective disabilities.—Code of 1876, §§ 2597-8.

Conceding that the alleged presentation was made within the requisite time, so far as concerns John D. Brandon, who was the youngest of the legatees or heirs, it was too late for his co-complainants, against whom the bar of the statute was complete. The rule is well settled in equity, that all the parties who join in a suit must be entitled to recover, or none can. The failure of one is the failure of all.—*James v. James*, 55 Ala. 525; *Hutton v. Williams*, 60 Ala. 107; *Hardeman v. Sims*, 3 Ala. 747.

The averments of fraud and fraudulent concealment made in the bill against the administrator, in reference to the *devastavit*, can give no aid to the case. It was expressly held in *Yniestra v. Tarleton*, 67 Ala. 126, that fraud on the part of the deceased creates no exception as against the operation of the statute of non-claim. Among the enumerated exceptions the legislature has seen fit not to specify fraud, and the judiciary department is incompetent to do it.

As the evidence in the record probably shows a presentation of the claim in controversy, so far as one of the complainants, John D. Brandon, is concerned, the decree of the chancellor will be amended so as to dismiss the bill without prejudice as to him, and, as so modified, the decree will be affirmed.

BRICKELL, C. J., not sitting.



[Sistrunk, Adm'r, v. Ware.]

**Sistrunk, Adm'r, v. Ware.***Bill in Equity to Charge Lands Devise with a Moneyed Legacy.*

1. *When legacy is, in equity, a charge on real estate devised.*—If real estate is devised upon condition to pay a legacy, or with a direction that the devisee pay the legacy in respect to the estate so devised to him, and because the real estate has been devised to him, such real estate is, in equity, chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption, or from which it can be inferred that the testator intended to exempt the estate devised from that charge.

2. *In determining whether legacy a charge on real estate devised, intention of testator must govern.*—In determining whether a legacy is a charge on real estate devised, the intention of the testator must govern. The intention to charge may be expressed, or the charge may be created by fair and just implication. Whenever it appears satisfactorily that the devise was given on condition, or on the consideration that the devisee should pay the legacy, the real estate will be charged. But such charge can not be implied, when it appears that the testator intended that the legacy should be paid by the devisee from other gifts made to him, although such gifts from any cause may be insufficient for the payment, or may become insufficient from the fault of the devisee.

3. *Construction of will; legacy under, not a charge on real estate devised.*—A testator, by the second item of his will, devised and bequeathed to his wife, for the term of her natural life, a large tract of land and the personal property thereon, and by the third item of his will he devised and bequeathed to her absolutely his dwelling house and certain personal property. The fourth item of his will is in these words: "It is my will and desire, and I do hereby give and devise all my moneys and choses in action, that I may have at the time of my death unto my said wife, to have and to hold to her, subject to the following conditions, that is to say, if demands which the law requires to be paid come against my estate, to the amount of ten thousand dollars, or less, my said wife shall settle and pay said demands, not exceeding ten thousand dollars, and shall also pay to my grand-daughter, Kate M., the sum of five thousand dollars, payable at such time as my said wife may deem proper, without interest. If, however, more than ten thousand dollars shall come against my said estate, in debts to be paid to creditors, then it is my will that the balance over and above the sum of ten thousand dollars to be paid, as above, by my said wife shall be borne and paid equally by her and my three children, hereinafter named, in equal proportions." And the eighth item of said will is in these words: "I will and bequeath five thousand dollars to my grand-daughter, Kate M., which five thousand dollars shall be paid to her by my said wife, as is above provided in this will." Held, that the devises of the real estate to the testator's wife are specific, distinct from, and independent of the bequest to her of the moneys and choses in action; that they contain no words of charge, but are unconditional; and that the real estate devised is not chargeable with the legacy to the grand-daughter.

[Sistrunk, Adm'r, v. Ware.]

Heard before Hon. H. AUSTILL.

The original bill in this cause was filed by Kate W. Sistrunk, formerly Kate Molton Ware, daughter of Robert Y. Ware, and grand-daughter of Robert J. Ware, deceased, a married woman, by her next friend and husband, Walter Sistrunk, against Asenath A. Ware and others, for the purpose of charging certain real estate devised to Asenath A. Ware, by the will of Robert J. Ware, deceased, with the payment of a legacy bequeathed by the will to Mrs. Sistrunk. The will was made an exhibit to the bill. Afterwards Mrs. Sistrunk died, and the appellant, as her administrator, came in and made himself partly complainant, under the rule. The defendants demurred to the bill on the ground, among others, that it was shown by the bill and the will exhibited thereto, that said testator did not charge the devises to Asenath A. Ware with the payment of said legacy. The Chancery Court rendered a decree sustaining the demurrer and dismissing the bill; and that decree is here assigned as error.

D. S. TROY and H. C. TOMPKINS, for appellant.

ARRINGTON & MORRISETTE, WATTS & SONS, and R. M. WILLIAMSON, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—Robert J. Ware died, having made and published his last will, which was subsequently admitted to probate. By the second item of the will, he devises and bequeaths to his wife Asenath A., for the term of her natural life, a plantation containing four or five thousand acres of land, and all the personal property thereon situate. By the third item, he devises and bequeaths to her absolutely his dwelling house, situate in the city of Montgomery, with all the household and kitchen furniture, and household appliances thereunto belonging, or which were there at the time of his death, with the carriage and horses she was then accustomed to use. The fourth item is in these words: "It is my will and desire, and I do hereby give and devise all my moneys and choses in action, that I may have at the time of my death, unto my said wife, Asenath A. Ware, to have and to hold to her, subject to the following conditions, that is to say, if demands which the law requires to be paid, shall come against my estate, to the amount of ten thousand dollars, or less, my said wife shall settle and pay said demands, not exceeding ten thousand dollars, and shall also pay to my grand-daughter, Kate Molton Ware, daughter of Robert Y. Ware, the sum of five thousand dollars, payable

[Sistrunk, Adm'r, v. Ware.]

at such time as my said wife may deem proper, without interest. If, however, more than ten thousand dollars shall come against my said estate, in debts to be paid to creditors, that it is my will that the balance over and above the sum of ten thousand dollars to be paid, as above, by my said wife, shall be borne and paid equally by her and my three children, hereinafter named, in equal proportions." The eighth item of the will is in these words: "I will and bequeath five thousand dollars to my grand-daughter, Kate Molton Ware, which five thousand dollars shall be paid to her by my said wife, as is above provided in this will." Kate Molton having intermarried with the appellant, on the 23d day of November, 1872, Mrs. Ware made her promissory note payable at one day to said Kate M., for the said five thousand dollars, as expressed in the note, "the amount required by the will of R. J. Ware, deceased, to be paid to her by me." It is further expressed that "this note is not to have the effect of discharging any property given to me by said will, from any liability or lien existing by operation of law for the payment of said legacy." The purpose of this bill is to charge the real estate devised to Mrs. Ware with the payment of the said legacy of five thousand dollars, upon averments of her insolvency, and that the personal property bequeathed her has been consumed and otherwise appropriated.

If real estate is devised upon condition to pay a legacy, or with a direction that the devisee pay the legacy in respect to the estate so devised him, and because the real estate has thus been devised, such real estate is in equity chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption; or from which it can be inferred that the testator intended to exempt the estate devised from that charge.—*Harris v. Fly*, 7 Paige 421; Willard's Eq. 489. The rule is thus stated: "If legacies be given, and at the same time directed to be paid out of the real property; or where the real estate is given to A., either *in presenti* or *in futuro*, he paying out of it certain legacies; or if the land be charged with such payments; in each case, the devised estate will be the only fund out of which those sums are to be paid. The reasons are these: the estate in the one case is expressly encumbered, and in the other, it is intended to be divided between the devisee and legatees. In the last instance, the estate is given upon condition that the devisee make the specific payments. He takes the land *cum onere*, and *non constat* the estate would have been devised to him, unless the testator had conceived that the legacies would have been discharged out of it."—1 Roper, Leg. 670.

In reference to the application of this rule, as in reference to all other questions arising in the construction of wills, the in-



[Sistrunk, Adm'r, v. Ware.]

tention of the testator must govern. The intention to charge the real estate may be expressed, or the charge may be created by fair and just implication. Whenever it appears satisfactorily that the devise was given on condition, or on the consideration that the devisee should pay the legacy, the land will be charged. The charge can not be implied, when it appears that the testator intended the legacy should be paid by the devisee from other gifts made to him, though such gifts from any cause may be insufficient for the payment, or may become insufficient from the fault of the devisee.

The devises of the real estate to Mrs. Ware are specific, distinct from, and independent of the bequest to her of the moneys and choses in action. They contain no words of charge, nor any expression akin to those from which, in decided cases, a charge has been implied. The legacy of five thousand dollars to Kate Molton Ware is introduced into, and connected with the bequest of the moneys and choses in action, and forms part of the directions as to the payments Mrs. Ware is required to make from that bequest. The devises of the real estate are unconditional—the bequest of the moneys and choses in action is upon terms and conditions—the payment of the debts of the testator to the amount of ten thousand dollars, and of the legacy of five thousand dollars to Kate Molton Ware. The testator appoints the fund which is charged with the payment of the legacy, and it is with respect to that fund the devisee is required to pay the legacy, and not with respect to the real estate. If the direction had been that the legacy should be paid because of the real estate devised for life, it would not be insisted, the real estate devised in fee simple was charged with the payment of the legacy.—2 Lomax Ex. 171. The same reasoning which would confine the charge of the legacy to the particular real estate in the case supposed, confines it, under the terms of this will, to the gift of the moneys and choses in action. By the acceptance of the gift of the moneys and choses in action, Mrs. Ware may have become personally liable for the payment of the legacy. To fasten upon her such liability, is not a purpose of the bill as now framed; and it is apparent that question was not presented to the chancellor.

We find no error in the record, and the decree must be affirmed.

[The Alabama Great Southern Railroad Company v. Killian.

## **The Alabama Great Southern Railroad Company v. Killian.**

### *Action against Railroad Company for Injury to Stock.*

1. *Sections 1701 and 1711 of the Code construed.*—Section 1701 of the Code of 1876 was superseded by the later enactment now embodied in section 1711 of that Code, as to the *time* within which the claim for damages for injuries done to stock by a railroad company, should be presented; but that section still stands as a regulation as to the *manner* in which the claim must be preferred. Hence, the claim must still be in writing, and must be presented to one of the officers or employees named in that section.

2. *What is not a presentation of claim for damages for injuries done to stock by railroad company.*—The giving of notice to a “section boss” of a railroad company by the owner of a horse killed by the train of that company, that he claimed damages for and on account of the killing of the horse, can not be regarded as a presentation of the claim within the requirements of the statute.

3. *When claim for stock killed by railroad company, is barred.*—A claim for damages for stock killed by the train of a railroad company, is barred, where it was not presented as required by statute, and suit was not commenced thereon until after the expiration of six months from the date when the horse was killed.

### **APPEAL from DeKalb Circuit Court.**

Tried before Hon. LEROY F. BOX.

This was an action brought by the appellee against the appellant, for damages resulting from the killing of a horse by the locomotive of appellant, and was commenced in said court on the 29th of September, 1880. The cause was tried on the pleas of the general issue and of the statute of limitation of six months. The evidence tended to show, that the value of the horse was \$125.00, and that it was killed by the appellant's locomotive on the 14th, 15th or 16th of February, 1880. The other evidence is sufficiently stated in the opinion. The appellant asked the court in writing to give to the jury the following charges: 1. “That if they believe all the evidence, they must find for the defendant.” 2. “That if the jury believe from the evidence, that the plaintiff's horse was killed by the locomotive or engine of defendant in February, 1880, and that the present suit was not commenced until some time in September, 1880, then upon this state of facts, the claim of the plaintiff for damages for killing that horse is barred by the statute of limitations in such case made and provided.” The court refused to give these charges, and the appellant excepted. The jury returned

[The Alabama Great Southern Railroad Company v. Killian.

a verdict for the appellee, on which a judgment was rendered in his favor.

The errors here assigned are the rulings of the Circuit Court above noted.

RICE & WILEY, and L. A. DOBBS, for appellant.

WATTS & SONS, *contra*.

STONE, J.—The claim in this case not being “presented in writing . . . to the president, treasurer, superintendent, or some depot agent of the railroad company,” the plaintiff in the court below, appellee here, can claim no advantage from the claim the proof tends to show he made.—Code of 1876, § 1701. That section, as we understand it, being superseded by section 1711 as to the *time* within which the claim may be made, still stands as a regulation as to the *manner* in which it must be preferred. It must still be in writing, presented to one of the officers or employes named. The suit in this case was brought more than six months after the alleged injury was done, and hence that act can not be relied on as a presentation of the claim within six months. The language of the statute is, that “all claims for damages shall be barred, unless complaint is made within six months from the date of such killing or injury to live stock or cattle of any kind.”—Code, § 1711. In *South and North R. R. Co. v. Morris*, 65 Ala. 193, we said, “that section 1711, which allows six months within which claims of this kind may be sued on, is constitutional and in full force; and being in conflict with section 1701, and more recent in the date of its enactment, it repeals the latter section. The action was not barred then in sixty days, but in six months from the date of the injury for which this suit is brought.” Now, this language clearly asserts two propositions: that the claim is not barred in sixty days, and that it is barred in six months. The present is a suit for killing live stock by the defendant railroad company. The only evidence given of the presentation of the claim within six months, was that “the plaintiff introduced evidence tending to prove that within six months after the killing of said horse of plaintiff, the plaintiff gave notice to a section boss that plaintiff claimed damage for and on account of said killing of said horse.” The bill of exceptions states it contains all the evidence. This can not be regarded as a presentation of the claim within the requirements of the statute. As shown in the evidence, the plaintiff’s claim was barred, and the jury should have been so instructed.

Reversed and remanded.

VOL. LXIX.



[Busbin v. Ware.]

**Busbin v. Ware.***Attachment by Landlord for Rent and Advances.*

1. *Motion to quash attachment.*—A motion to quash an affidavit for defects apparent on the face of it, or a motion to quash a writ of attachment for similar defects, if made within the time prescribed for filing pleas in abatement, is addressed to the sound discretion of the court and may be entertained accordingly; or it may be refused, and the party making the motion, put to his plea, as the court may elect.

2. *When affidavit by landlord for attachment defective.*—An affidavit by a landlord for the purpose of obtaining an attachment for rent and advances, which states, as a ground for the attachment, that he “has good cause to believe said tenants are about to remove from the premises, or otherwise dispose of the crop without paying the amount which will be due for rent and advances,” is fatally defective in failing to aver, that the contemplated removal of the crops from the premises of the landlord was without his consent; and a motion to quash the attachment issued thereon, made at the first term at which it could have been made, was properly allowed.

APPEAL from Cherokee Circuit Court.

Tried before Hon. LEROY F. BOX.

This was an attachment by W. H. Busbin, landlord, the appellant, against Jarret Ware and Charley Dickson, tenants, the appellees, and was sued out on the 25th September, 1880, for the purpose of enforcing his statutory lien for rent and advances. The affidavit on which the attachment was issued averred, that the rent and advances would be due on 25th December, 1880, and the ground for the attachment is in these words: “That affiant has good cause to believe said tenants are about to remove from the premises, or otherwise dispose of the crop without paying the amount which will be due for rent and advances.” On the first day of the spring term, 1881, of said court, the appellees moved to quash the affidavit and attachment on the ground, in substance, that the affidavit did not state that the apprehended removal of the crop from the appellant’s premises, was without his consent. The court sustained the motion and quashed the attachment, and this ruling is here assigned as error.

WALDEN & SON and REEVES, for appellant.—(1). There are three distinct grounds given by the Code for an attachment in favor of the landlord against his tenant.—Code of 1876, § 3472. Like grounds for ordinary attachments, they are separate and

[Busbin v. Ware.]

distinct. The affidavit for the attachment in this case not only *substantially* conforms to the requirements of sub-division 1 of § 3472, but it is a *verbatim* copy of that sub-division. This sub-division does not require the landlord to negative his consent to the act "about" to be done. There is good reason for the failure of this sub-division to require that the landlord's consent shall be negatived. Before the crop is removed, and while it remains upon the premises, the world is charged with notice of the lien.—*Lomax v. Le Grand & Co.*, 60 Ala. 537. After its removal rights of innocent purchasers may intervene and thus prevent the landlord from following the crop.—*Masterson v. Bentley*, 60 Ala. 520; *Scaife v. Stovall*, 67 Ala. 237. See also *Dryer v. Abercrombie*, 57 Ala. 500. (2). The law is to be construed liberally to advance its manifest intent.—*Fleener v. Dickerson*, 65 Ala. 129. It would be an *illiberal* construction to hold, that the intent of the law is not as expressly stated in this sub-division, but that a part of the second sub-division must exist in order to give the landlord his remedy under the first sub-division. (3). *De Bardeleben v. Crosby*, 53 Ala. 363, is based on a different state of facts, and the point here mooted was not raised in that case.

JAMES H. SAVAGE, *contra*.—(1.). The first two sub-divisions of section 3472 of the Code of 1876, are in the Code of 1852, and were brought forward into the Revised Code; and in each the second sub-division concludes in the words, "without the consent of the landlord." Afterwards the statute was amended by adding another ground of attachment, which is embodied in sub-division 3 of section 3472 of the Code of 1876. This last sub-division is not, therefore, a part of the original statute and does not come within the requirement to negative the consent of the landlord. The other two sub-divisions are to be construed together, and the words, "without the consent of the landlord," applies to both. If the law were otherwise, the landlord might give his consent to the removal of the crop and afterwards take advantage of it, and sue out an attachment, and involve the tenant in costs and damages, when his cause of belief, that the crop was about to be removed, was based on the fact, that he had consented to such removal. He is, therefore, required to negative his consent, when he seeks an attachment under the first sub-division. (2). The case of *De Bardeleben v. Crosby*, 53 Ala. 363, clearly settles this question.

SOMERVILLE, J.—A motion to quash an affidavit for defects apparent on the face of it, or a motion to quash a writ of attachment for similar defects or irregularities, if made within the time prescribed for pleading in abatement, is addressed to the sound discretion of the court, and may be entertained accord-

[Washington v. Washington.]

ingly; or it may be refused and the party making the motion put to his plea, as the court may elect.

The motion to quash in this case was properly allowed under the authority of *De Bardeleben v. Crosby*, 53 Ala. 363. It seems to have been made at the first term at which it could have been made, as required by the 13th Rule of Practice (Code, 1876, p. 160), and the affidavit was defective in failing to aver that the contemplated removal of the crop from the premises of the landlord was *without his consent*. The statute, in our opinion, requires the consent of the landlord, or of his assignee, to be negatived, whether the averment is that the removal of the crop is about to be made by the tenant, or whether it has already taken place.—Code, 1876, § 3472; *De Bardeleben v. Crosby*, *supra*.

Judgment affirmed.

## Washington v. Washington.

### *Petition for Dower.*

1. *Marriage between slaves invalid*.—During the existence of slavery, one of the disabilities to which it necessarily subjected the slave, was an incapacity to form the legal relation of husband and wife. Into that relation, depending upon a contract formed by the mutual and concurring assent of the parties to it, and involving mutual obligations and duties, the slave was incapable of entering, because of the paramount rights of the master, to which the will and ability of the slave were subordinated, and which were inconsistent with the power of the slave to contract, and with his yielding the assent, incurring the obligations, and performing the duties incident to marriage.

2. *Same; while invalid, not immoral*.—While slaves were incapable of contracting marriage under the municipal law of force during the existence of slavery, the relation of husband and wife entered into between them with the consent of the master, and solemnized with the customary rites and ceremonies, was not immoral, but imposed a moral obligation, which was recognized and respected by public opinion.

3. *Slaves emancipated by ordinance of 22d September, 1865*.—The institution of slavery ceased to have a legal existence in this State from and after the adoption, by the Constitutional Convention of 1865, of the ordinance of 22d September of that year, which declared that thereafter there should not be in this State "slavery nor involuntary servitude, otherwise than as a punishment for crime."—(Rev. Code, p. 53.)

4. *Ordinance of 29th September, 1865, ratifying and legalizing marriages between freedmen and freedwomen*.—The ordinance of the 29th September, 1865 (Rev. Code, p. 64), adopted by the convention in recognition of the necessity for a definition of the legal status of the population emancipated from slavery, living together as man and wife, commends itself to the moral sense, is eminently just, conservative of social order, promotive of morality, and preservative of the legitimacy and rights of the innocent



[Washington v. Washington.]

offspring of the pre-existing union it ratified and legalized, and belongs to a class of legislation, which, when employed for such beneficent purposes, deserves the highest judicial consideration.

5. *Same; its effect and operation.*—By force of the ordinance, all the legal infirmity of the relation between the parties to whom it applied, was removed, and they became man and wife. By the ordinance they were not compelled into an involuntary relation; but the voluntary relation which they had formed, and which, by continuance after emancipation, they had affirmed, so far as it was capable of confirmation by their own acts, was legalized.

6. *Same.*—This ordinance had no reference to, or effect upon mere illicit intercourse, not intended, or recognized by the parties as marriage. It is not the cohabiting *like* man and wife, but the cohabiting *as* man and wife, and in mutual recognition of the relation, the ordinance legalizes.

7. *Same; widow of freedman whose marriage was thereby legalized, entitled to dower.*—Under the operation of this ordinance, the marriage of two negroes, who intermarried in 1847, while they were both slaves, and who continued to live together as man and wife until their emancipation, and thereafter for several months after the adoption of the ordinance, was legalized, and on the death of the man, the woman, as his widow, was entitled to dower in his lands, although the man, in October, 1866, abandoned her, procured a marriage license and married another woman, with whom he lived as his wife until his death.

APPEAL from Hale Probate Court.

Tried before Hon. JAMES M. HOBSON.

The facts are stated in the opinion.

THOS R. ROULHAC, for appellant.

THOS. SEAY, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—This was an application by the appellee to the court of probate, for an assignment to her as widow of Gus Washington, deceased, of dower in the lands of which he died seized and possessed. The contention in the court of probate was confined to the single fact of marriage between the appellee and the decedent. The cause was submitted to, and heard by the judge of the court of probate without the intervention of a jury. The findings of fact by the judge are specially stated in the judgment rendered as follows: "Edie, the said petitioner, under a certain form, was, while both were in a state of slavery, married to the said Gus Washington, in the year 1847, and thereafter, and during the time they continued in a state of slavery they lived together after the custom of slaves, as man and wife; that they continued to live in the same way and manner up to the 29th day of September, 1865, and for several months thereafter, to-wit: some time in the fall of 1866. That petitioner had by said Gus several children and one born dead after the abolition of slavery. In the fall of the

[Washington v. Washington.]

year 1866, the said Gus Washington left the petitioner and obtained from the probate court of Green county, the court at that time authorized to issue marriage licenses to parties located as Gus and Martha were, a marriage license under which the ceremony of marriage was performed between them, the said Martha and Gus, by F. M. Harris, then an acting justice of the peace, duly authorized to perform said ceremony. That said Gus Washington lived with and recognized as his wife, the said Martha, from that time until his death, and had by her several children, all of whom are under the age of twenty-one years. That the said Gus had been in the habit of visiting the said Martha before and during the year, 1865, and had by her a child before the ceremony above spoken of was performed." The pleadings are all supported by the preponderance of the evidence; and it may also be added that in 1487 Edie and Gus were the property of the same master, were married by his consent, the ceremony of marriage being performed by a minister of their own race; and with the consent of the master, as man and wife they cohabited until emancipation. An illicit intercourse sprung up between Gus and Martha, continuing until their marriage in October, 1866, and into the marriage they were induced by threat, or by the pendency of a prosecution against them for adultery. The judge of the court of probate adjudged that Edie was the lawful wife, and awarded to her dower.

It is certainly true, that while slavery existed, one of the disabilities to which it necessarily subjected the slave, was an incapacity to form the legal relation of husband and wife. That relation then depended, and now depends upon contract,—a contract formed by the mutual and concurring assent of the parties to it, involving mutual obligations and duties. The slave was incapable of contracting, of yielding the assent, of incurring the obligations, and performing the duties, because of the paramount rights of the master to which his will and ability were subordinated. In *Malinda v. Gardner*, 24 Ala. 719, this court, speaking of marriage as between slaves, said: "Persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one can not be discharged, nor the other recognized without doing violence to the rights of the owner. In other words, the subjects of the contract must cease to be slaves before the incidents inseparable to the relation of marriage, in its proper sense, can attach." All this, it must be observed, refers to the relation of husband and wife, as established by, and the obligations and

[Washington v. Washington.]

duties which, according to the municipal law, flowed from the relation. As matter of fact, by universal usage, by the encouragement and consent of the master, the relation of husband and wife was formed between slaves, and often the marriage solemnized by the rites and ceremonies attending the solemnization of the marriage of their owners. The moral obligation resulting from the union, the master enjoined them to observe; and public sentiment so far respected the union, that the master who wantonly separated husband and wife, provoked from his neighbors indignation and reproach. While, in the contemplation of law, there was not a binding or obligatory marriage, there was a union of moral force and obligation. In *Smith v. State*, 9 Ala. 996, said ORMOND, J.: "whilst we admit the moral obligation which natural law imposes in the relation of husband and wife among slaves, all its legal consequences must flow from the municipal law."

When slavery was abolished—when the slave was emancipated from bondage and subordination to the master, the mass of adult freedmen and freedwomen were living as, and their children were born of the relation of, husband and wife, which they had formed while slaves. Whether, if after emancipation they had continued to live together as man and wife, contemplating and intending a continuance of the relation they had formed, they would not have been deemed married, and all the incidents, rights and duties the law attaches to marriage would not have flowed from their consensual cohabitation, founded upon a union not wanting in any element of morality, is not a question in this case, and can scarcely become here a practical question.

In this State, the constitutional convention of 1865 (R. C. of 1867, p. 53), on the 22d September, adopted an ordinance in recognition of the fact that the events and results of the war had destroyed slavery; and declaring that thereafter, in this State, there should not be "slavery nor involuntary servitude, otherwise than as a punishment for crime." A similar provision was introduced into the constitution then formed, and has been introduced into the subsequent constitutions. From the adoption of that ordinance slavery ceased to have a legal existence in this State. A definition of the legal status of the population emancipated from slavery, living together as husband and wife, was a necessity. On the 29th September, 1865, the convention adopted an ordinance (R. C. 1867, p. 64), providing that "all marriages between freedmen and freedwomen, whether in a state of slavery or since their emancipation, heretofore solemnized by any one acting or officiating as a minister, or any one claiming to exercise the right to solemnize the rites of matrimony, whether bond or free, are hereby ratified and made



[Washington v. Washington.]

valid, provided the parties are now living together as man and wife; and in all cases of freedmen and freedwomen who are now living together recognizing each other as man and wife, be it ordained, that the same are hereby declared to be man and wife, and bound by the legal obligations of such relationship.” Before the ordinance, the marriages occurring prior to emancipation, were wanting in legal obligation and incapable of legal recognition—were wanting in legal validity, because of the legal incapacity of the slave to yield assent, and to incur the legal obligations and duties of husband and wife. Their relation was not immoral, and was not unlawful, in the sense of falling within legal prohibitions. The ordinance commends itself to the moral sense, is eminently just, conservative of social order, promotive of morality, and preservative of the legitimacy and rights of the innocent offspring of the pre-existing union it ratifies and legalizes. There is no room to doubt the power of the convention to enact it, and it belongs to a class of legislation which, when employed for such beneficent purposes, deserves the highest judicial consideration.—*Goshen v. Stonington*, 4 Conn. 209. Similar legislation was adopted in all the States in which slavery was abolished, and its validity has not, so far as I know, been questioned.

In its practical operation, the ordinance accomplished but little more than an application of the principle of the common law touching the marriage of persons before reaching the age of consent, and the marriage of lunatics. The marriage of an infant before reaching the age of consent is inchoate and imperfect, and when the age of consent is reached, the marriage may be disaffirmed without divorce or judicial sentence. But if, on reaching the age of consent, the marriage is affirmed by a continuance of the relation, it is valid and incapable of dissolution by the voluntary act of the parties.—1 Black. 436; *Beggs v. State*, 55 Ala. 108. And if while one of the parties is insane, marriage is entered into, and after a lucid interval, after a restoration to reason, while there is capacity to consent, cohabitation is continued, it cures the infirmity of the contract, and the marriage becomes valid.—1 Bish. Mar. and Div. § 140. Mr. Bishop is of opinion these principles are applicable, after emancipation, to the marriage formed by slaves.—1 Bish. Mar. and Div. §§ 154–163. This view prevails in Louisiana (*Girod v. Lewis*, 6 Mart. La. 559; *Pierre v. Fontenette*, 25 La. Ann. 617); in Tennessee (*McReynolds v. State*, 5 Cald. 18); and in Missouri (*Johnson v. Johnson*, 45 Mo. 595). The reasons supporting it are thus expressed by MATTHEWS, J., in *Girod v. Lewis*, *supra*: “Emancipation gives to the slave his civil rights; and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom,

[Hill v. Townsend and Eubanks.]

although dormant in slavery, produces all effects which result from such contracts among free persons." This view was dissented from, and an opposite doctrine declared by PEARSON, C. J., in *Howard v. Howard*, 6 Jones L. (N. C.) 235. Upon this question we do not enter, for the facts of the case bring the relation shown to have existed between the petitioner and the decedent within the letter and spirit of the ordinance. By force of the ordinance, all the legal infirmity of their relation was removed and they became husband and wife. They were not compelled into an involuntary relation, but the voluntary relation they had formed, and which by continuance after emancipation they had affirmed, so far as it was capable of confirmation by their own acts, was legalized.

The ordinance of the convention had no reference to, and no effect upon mere illicit intercourse, not intended or recognized by the parties as marriage. It was not designed to sanctify such intercourse, immoral and vicious in its origin and continuance. Under its operation, the relation existing between the decedent and Martha, however notorious or long continued, could not have ripened into marriage. As is said by the Supreme Court of Mississippi, it is not the *cohabiting like man and wife*, the ordinance legalizes, but the cohabiting *as man and wife*, and in mutual recognition of the relation.—*Rundle v. Pegram*, 49 Miss. 751.

We find no error in the decree of the court of probate, and it is affirmed.

## Hill v. Townsend and Eubanks.

### *Statutory Action for the Recovery of Chattels in Specie.*

1. *Contract; construction of.*—Where in a contract of sale of personal property consisting of a steam saw and grist mill, with certain appurtenances, it was provided that the purchase-money should be paid in installments, and that upon default in the payment of any one of the installments, the purchaser should forfeit all former payments made by him, and, on the demand of the seller, should "give into his possession the mill with all the additions thereto, in good running order, with all obtained from him," the words "additions thereto," as used in the contract, do not embrace detached articles of personal property purchased to aid in operating the mill, such as oxen, carts, etc., but only such personal property as was in fact added to the mill.

2. *Charge of the court where the evidence is conflicting.*—Where the evidence in a cause is conflicting, and the case is presented to the jury in two variant phases, each party is justified in having the jury instructed as to the law, as it would arise if his hypothesis were the true one. The

[Hill v. Townsend and Eubanks.]

charge, however, must properly refer to the jury the finding of the facts, and the application of the law must be made contingent on the ascertainment of the facts embraced in the hypothesis.

3. *Parol contract of sale of personal property valid.*—A parol contract of sale of personal property is valid.

4. *Forfeiture in contract of purchase of personal property does not exist, unless specially provided for.*—The law does not favor a forfeiture in a contract of purchase of personal property, by which a party to the contract loses the benefit of all payments he has made thereon, and also all interest in the property, upon his failure to pay any one of a series of installments of the purchase-money; and to authorize or sustain such a claim of forfeiture, it must be specially provided for by the contract.

5. *Waiver of forfeiture in contract of sale of personal property.*—A forfeiture contained in a contract of sale of personal property, on default in payment of any one of several installments of the purchase-money, is waived, when the seller, after such default, enters into a new contract of sale with the original purchaser and others, and receives from them payment of all the installments then due from the original purchaser.

6. *Same.*—But a waiver of one or more of such forfeitures or defaults, is not a circumstance tending to show a waiver of subsequent defaults, or forfeitures based thereon; and a charge instructing the jury, that if four such forfeitures occur in succession, and the seller fails to claim and enforce either of them, then they may look to these facts, in connection with all the other evidence, for the purpose of determining whether he had waived the subsequent forfeitures, is erroneous.

7. *Charge of the court; when error without injury.*—A charge which refers to the jury the construction of a written contract, is without injury to the appellant, when the court should have construed such contract against the views maintained by him.

8. *When breach of contract by the seller of personal property will prevent a recovery based on a forfeiture.*—Where the plaintiff in an action for the recovery of chattels in specie, consisting of a steam saw and grist mill and appurtenances, claims under a forfeiture contained in a contract of sale made by him, as seller, with the defendants, as purchasers, and based on a default in payment of part of the purchase-money, and it is shown that, in violation of a clause in the contract, he failed to furnish the purchasers with certain timber privileges, he can not recover.

APPEAL from the City Court of Montgomery.

Tried before Hon. J. A. MINNIS.

This was an action of detinue, brought, under the Code, by John A. Hill against James B. Townsend and John W. Eubanks, to recover a steam saw and grist mill and other personal property, and was commenced on the 20th of April, 1880. The defendants pleaded the general issue, and upon an issue thus made the cause was tried, and resulted in a verdict and judgment for the defendants. The evidence introduced on the trial is sufficiently stated in the opinion.

The City Court, at the request of the defendants, gave to the jury the following charges: 3. "That this is not a suit in which the plaintiff can recover all or any of the property sued for, by evidence which only shows that the defendants bought the property, or some part of it, from the plaintiff, and that they owe the plaintiff a balance for all or some part of the property sued for; but it is a suit in which, to entitle the plaintiff to recover



[Hill v. Townsend and Eubanks.]

any or all the property sued for, the evidence must show, to the satisfaction of the jury, that the plaintiff, at the time the suit was commenced, upon all the evidence in this case, was entitled to the possession of all, or some part of the property sued for."

4. "That if the jury believe from all the evidence in this case, that the defendants and one Jasper Dillard, in the month of August, in the year 1879, purchased property of the plaintiff on a credit, to be paid for by the 1st day of December, in the year 1880, in monthly payments of about 7,000 feet of lumber, or at the rate of \$7.50 for each 1,000 feet of lumber, and then paid on said monthly payments up to the 1st day of December, 1879; that said contract was not in writing; that said contract was not reduced to writing by the fault of the plaintiff, and without the fault of the defendants; that said contract has not been further performed by the defendants on account of the fault of the plaintiff in not performing his part of the contract, then the jury must find for the defendants." (Charge numbered 5 contains substantially the same instructions as are contained in charge numbered 4, and need not be set out.) 7. "That if the jury believe from the evidence that the oxen, log-carts, wagon and blacksmith tools, in the complaint described, were not sold by the plaintiff to the defendants, but were purchased and acquired by the defendants from others, and that said oxen, log-carts, wagon and blacksmith tools were not additions to the steam saw and grist mill and appurtenances mentioned in the written contract, of date December 1st, in the year 1878, in evidence, within the meaning and intention of the parties to said contract, in the making of said contract, and as modified, if modified, by what occurred between the plaintiff and the defendants, and one Jasper Dillard, on or about the 19th day of August, in the year 1879, then, as to said log-carts, wagon, blacksmith tools and oxen, the jury must find for the defendants." 8. "That a sale and purchase of personal property is as valid in law, if made without writing, as if made with writing; and the property involved in the transaction between the plaintiff and the defendants and Dillard, in August, 1879, as shown by the evidence, was personal property." 10. "The law does not favor a forfeiture of a contract by which a party to that contract loses the benefit of all payments he has made upon the contract in the purchase of property, and also loses all interest in the property by such forfeiture, when such forfeiture is claimed upon the failure of such party to pay any one of a series of installments for the purchase-money of such property; and to authorize or sustain such a claim of forfeiture, it must be provided for by the contract as made between the parties." 11. "When a contract is made between parties, by which personal property is sold and purchased, to be paid for in monthly installments, the contract

[Hill v. Townsend and Eubanks.]

to be forfeited, and the property to belong to the seller upon the failure of the purchaser to pay any one of said installments, the *purchaser* may waive such forfeiture by failing to claim and enforce the forfeiture, and if four such forfeitures occur in succession, and the *purchaser* fails to claim and enforce either of said forfeitures, the jury may look at these facts and circumstances, in connection with all the other evidence in this case, for the purpose of arriving at a verdict, and of determining whether the plaintiff had waived all of said forfeitures at the time this suit was commenced; and if the jury further find that the plaintiff had waived every forfeiture, if any such existed, before the commencement of this suit, and that there was no forfeiture, or default of payment of any monthly installment, which had not been waived by the plaintiff at the time of the commencement of this suit, then the jury must find for the defendants." 12. "A man may always waive a condition in his own favor, and dispense with its performance, and this is also true of the forfeiture claimed by the plaintiff in this cause; and if the jury find from all the evidence, that the plaintiff had waived all the forfeitures for the non-payment of monthly installments at this time, then the jury must find for the defendants." To the giving of each of these charges the plaintiff excepted.

The plaintiff asked the following charges in writing, which the court refused to give, and the plaintiff separately excepted, to-wit: 1. "If the jury believe from the evidence, that the oxen, wood-wagon, log-carts, and blacksmith tools were necessary to the running of the mill, and were necessary to the mill, then the jury must consider the said oxen, wood-wagon, log-cart and blacksmith tools as 'additions' to said mill; and the plaintiff would be entitled to a verdict for such oxen, wood-wagon, log-carts and blacksmith tools, as well as for the other property appertaining to said mill." 2. "That if the parties made a new contract, by which Dillard, Townsend and Eubanks were to make monthly payments of lumber, and the parties failed to make the payments as stipulated, then Hill had a right, on such failure, to claim his property, and put an end to the contract, although nothing may have been said about it in the contract."

The giving of the charges asked by the defendants, and the refusal to give the charges asked by the plaintiff, are assigned as error.

WATTS & SONS, for appellant.

G. W. TOWNSEND, and BRAGG & THORINGTON, *contra*.

STONE, J.—John A. Hill, the appellant, on 1st December,

[Hill v. Townsend and Eubanks.]

1878, contracted in writing with Jasper Dillard to sell him a steam saw and grist mill, known as the Allen mill, with certain appurtenances—all being personal property. Dillard was to pay for the property \$1275 in lumber at seventy-five cents per hundred, in monthly installments, running through two years; being about 7,000 feet of lumber per month. The writing contains this clause: "If any one of these payments fails to be met promptly, then I, Jasper Dillard, forfeit all former payments that may have been made to said Hill, and on his demand, bind myself to give into his possession the mill with all the additions thereto, in good running [order], with all obtained from him." The written contract by some means became mutilated, and some of its provisions can not be learned. There is a failure of proof as to what they were. There is testimony tending to show that Townsend was interested with Dillard in making the purchase, though his name does not appear in the writings. The testimony was in conflict, whether Hill, when he made the sale, knew that Townsend was interested with Dillard in making the purchase. From the time of the purchase, the business was conducted by Dillard and Townsend jointly.

In August, 1879, Dillard and Townsend had made some payments of the purchase-money, but were in arrears several monthly installments, probably as many as three or four. Hill had not, and did not then claim the forfeiture provided for in the written contract with Dillard. A renewed contract was then entered into between Hill, the seller, and Townsend and Dillard, and one Eubanks, as purchasers. The terms of this contract were agreed on, August 19th, and were to be executed in writing on the 20th. Hill, the seller, did not attend at the designated place on the 20th, but subsequently presented a writing, claimed by him to express the terms of the contract, but which the purchasers refused to sign, on the alleged ground that it did not truly express the agreed terms. No writing was ever signed, expressing the terms of the contract of August 19th, 1879. The price and installments of the second contract were the same as those of the first; that is, the entire payment was to be completed December 1st, 1880. One of the terms of the agreement of August, 1879, was, that Eubanks was to pay Hill 35,000 feet of the lumber promised; which payment he made. This paid all installments to mature up to December 1st, 1879. The business was carried on by Townsend, Dillard and Eubanks, until Dillard sold out to his associates. It was then conducted in the names of Townsend and Eubanks, until this suit was brought in April, 1880. No payments were made of the purchase-money, after the payment made by Eubanks when he came in. This action for the recovery of chattels in specie, was brought upon an alleged forfeiture, under



[Hill v. Townsend and Eubanks.]

the terms of the contract. There is irreconcilable conflict in the testimony as to what were the terms of the contract made in August, when Eubanks became part purchaser, and Townsend became a recognized purchaser. The points of difference are as follows: Hill contended that it was part of the agreement that it should contain the forfeiture clause copied above, and he so framed the contract; that is, "If any one of these payments fails to be met," etc. Another clause inserted in the writing was, that the mill should not be removed from the place where it was then situated. The defendants denied that either of these clauses was in the agreement made; and there was testimony tending to show that Townsend was ignorant that the forfeiture clause was in the contract of December, 1878, until April, 1879, and that he objected to it. The insertion of the two clauses stated above were the reasons assigned by the purchasers for refusing to execute the written contract presented by Hill. The purchasers also gave testimony to show that it was one of the terms of the contract of August, 1879, that they were to have certain timber privileges on lands near the mill, and that they failed to obtain this right and privilege, because Hill had previously disposed of it to another. So, Hill's right of action was necessarily based on the assertion that the contract of August, 1879, contained a forfeiture stipulation similar to that in the contract of December, 1878, and that defendants had incurred the forfeiture by defaults in paying installments. The defense took different forms: First, that there was no forfeiture clause in the contract of August, 1879; second, if there was such forfeiture clause, Hill had waived it; third, that Hill had violated his part of the contract, in this, that he had put it out of his power to furnish, and failed to furnish to the purchasers the timber privileges he had contracted to furnish them.

When the contract of purchase was made, December 1st, 1878, the property purchased consisted of a saw and grist mill, six belts, some blacksmith's tools, one burned saw mill, two blue kuln stones, two pair mill rocks, lying outside of the mill, a lot of old irons, a cast iron roller, cast tires, and two boilers. There was afterwards added, or put at the mill by the defendants, two pairs of oxen, two log-carts, one wood-wagon and gearing frame and hopper. The suit was for all the articles enumerated; those afterwards purchased, as well as those on hand when the first contract of sale was agreed on. All the exceptions taken and errors assigned, are based on the charges given and refused.

We can not agree that articles purchased to aid in operating the mill can be classed as "additions thereto," unless they were in fact added to the mill. The language of the written con-

[Hill v. Townsend and Eubanks.]

tract forbids this interpretation. The promise is, in the contingency provided for, "to give into his [Hill's] possession the mill *with all the additions thereto*." Additions to what? Certainly to the mill. And these were to be delivered "in good running order." Now, it would be a strange use of language, if the intention was to embrace oxen, carts and a wagon. A stipulation that they should be *in good running order*, would certainly be unusual. But the argument is stronger than this. There is the superadded clause, "with all obtained from him." Why add this clause, if the "mill with all the additions thereto" included detached personal property, employed as agencies in operating the mill. If oxen and carts are additions, why are not all the other articles purchased from Hill equally parts of the mill?

Another preliminary remark. The testimony given for defendants tends to show that one of the stipulations of the contract of August, 1879, was, that the purchasers were to have certain timber privileges, which they failed to obtain. If this be true, then there was a breach of the contract by Hill. True, that may not have been a term of the contract, or there may have been no breach of it. Still, it serves to show the case was presented to the jury in two very variant phases. This presented a question for decision by the jury, and it could not be known or affirmed which phase they would find to be the true one. In such case, each party is justified in having the jury instructed as to the law, as it would arise if his hypothesis be the true one. Of course, such charge must properly refer to the jury the finding of the facts, and the application of the law must be made contingent on the ascertainment of the facts embraced in the hypothesis.—1 Brick. Dig. 336 to 339, §§ 15, 42, 49, 51, 54.

The City Court committed no error in giving charges numbered 3, 8, 10 and 12. They assert plain principles of law. Charges 4 and 5 are substantially alike. The contract of August contained the term that Hill was to furnish the purchasers certain timber privileges, and if he failed to do so, then he had violated his contract, and he should not recover. The charges given were justified by one phase of the testimony, and the court did not err in giving them. If they were too general, obscure, or had a tendency to mislead, the party objecting should have asked a more specific or explanatory charge.—1 Brick. Dig. 336, § 10. What we have said above shows that the court did not err in giving charge 7. Even if that charge be obnoxious to the criticism, that it referred it to the jury to construe a written contract, this did the appellant no injury. The court should have construed the instrument against the views of the appellant, and the jury could have done nothing more.—1 Brick. Dig. 387, §§ 26, 27.

[Hill v. Townsend and Eubanks.]

The bill of exceptions asserts that it contains substantially all the evidence, and that on this evidence the charge of the court was given. The testimony shows the purchasers committed some defaults in the payment of installments, before August, 1879. All these defaults and forfeitures were waived by Hill, when he agreed to the terms of the contract of August, 1879, and received from Eubanks payment of all past due installments. He also, according to the testimony, received payment of all installments to mature up to December, 1879. There could, therefore, be no default or forfeiture until after that time. No payments were made after the August payment by Eubanks. This suit was commenced, April 20th, 1880, when there had been a failure to pay some four monthly installments. One of the three forms in which the defense was attempted to be made, was that Hill had waived these alleged grounds of forfeiture. The only evidence of waiver is what is shown above. As we understand charge 11, it instructed the jury that they might look to the waiver of these former grounds of forfeiture as a circumstance to be weighed in determining whether there had not been a waiver as to all the grounds. The charge as found in the record is worse than this. It asserts that the *purchaser* could waive these forfeitures—and states “if four such forfeitures, etc., occur in succession, and the *purchaser* fails to claim and enforce either of said forfeitures,” then the jury may look at these facts in connection with all the other evidence, for the purpose of determining whether the plaintiff had waived all of said forfeitures. We attempt to give the substance, not the entire language of the charge. The insertion of the word *purchaser*, when it should have been *seller*, may be an error in copying. But if the word *seller* was substituted, the charge can not be maintained. The waiver of one or more forfeitures or defaults is not a circumstance tending to show a waiver of later defaults. Most well disposed persons would be disinclined to resort to harsh or extreme measures on a first default. There might be excusing or palliating circumstances, and humane vendors would feel inclined to give to purchasers another trial. To convert such indulgence or forbearance into an instrument of offense, would be to attach a penalty to what is usually an instinct of kindness, or an aversion to a hasty resort to legal remedies.—1 Brick. Dig. 396, §§ 274–5. In this single ruling the City Court erred.

The charges asked by plaintiff were rightly refused. The law will not imply conditions in such contracts, and make them grounds of forfeiture. They must be expressed.—2 Pars. on Contracts, Ed. of 1864, 526.

Reversed and remanded.



[Cook v. Cook et al. Ex'rs.]

**Cook v. Cook et al. Ex'rs.***Compulsory Settlement of Executor's Accounts.*

1. *Executors and administrators ; powers of the probate court to compel settlement.*—Under the statutory provisions of this State (Code of 1876, §§ 2508, 2524, 2525, 2528), the jurisdiction of the probate court to compel a final settlement of the accounts of an executor or administrator, after the lapse of eighteen months from the grant of letters, does not depend on the petition of a party interested in the estate, invoking the exercise thereof; but the court may then, *ex mero motu*, compel such settlement, if the condition of the estate will admit of it.

2. *Same ; when debtor appointed, presumption of payment arises.*—When letters testamentary or of administration are granted to a debtor of the decedent, the presumption of payment at once arises, without reference to his solvency, or the duration of his administration.

3. *Executors and administrators ; when decree on settlement may be rendered in favor of one personal representative against another.*—The only case in which a decree is authorized in favor of one personal representative against another, is where there has been a removal, resignation, or a revocation of the letters, of an executor or administrator, or from some other cause his authority ceases. In such case the decree may be rendered in favor of the remaining or succeeding executor or administrator.

4. *Same ; when such decree is not authorized.*—A decree rendered on an account stated by the court under the statute, against one of three executors, whose authority as such had not ceased, and who had failed to file his accounts and vouchers and make a settlement of his executorship, after having been duly cited for that purpose, in favor of the other two executors, is unauthorized and erroneous. In such case, the decree should be rendered in favor of the devisees or legatees under the will.

**APPEAL from Baldwin Probate Court.**

Tried before HON. W. H. GASQUE.

John Cook, the appellant, and Joachim B. Cook and Alexander Cook, the appellees, were duly appointed the executors of the last will and testament of John Cook, Sr., deceased, on the 23d of December, 1878, by the Probate Court of Baldwin county, in this State. On the 8th of November, 1880, the appellees filed in said court their account and vouchers for a final settlement of their executorship, and also two petitions, one as such executors, and the other as legatees and distributees under the will of their testator, for the purpose of compelling the appellant to also make a settlement of his executorship. From the averments of these petitions it appears that more than eighteen months had elapsed since the grant of letters testamentary; that said estate was solvent and no longer required "the continuance of an administration" thereon; that the appellant had acted with them in the administration of their tes-

[Cook v. Cook et al. Ex'rs.]

tator's estate, but had refused to join them in a final settlement thereof, and that he had received a large amount of money belonging to said estate and subject to distribution, for which he had refused to account. On the 8th of January, 1881, on proceedings had in the cause made by said petition, the court stated an account against the appellant as such executor, charging him with the sum of \$2,000, which, as found by the court from the evidence, he had in his hands belonging to his testator at the time of the death of the latter. He was then cited to appear on the 31st of March, 1881, and file his account and vouchers for settlement, or that the account so stated would then be passed. On the day last named the appellant appeared, but failed to file his account or vouchers, and the court thereupon passed the account as stated against him on the 8th of January, and rendered a decree against him in favor of the appellees, as executors of John Cook, Sr., deceased, for \$2,000, and this decree is here assigned as error.

THOS. H. PRICE, for appellant.

W. S. ANDERSON, and COBBS & TOMPKINS, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—Every executor or administrator is required by law to make annual settlements of his administration, and “may, when necessary for the interests of the estate, *be required* to make a settlement at any time.”—Code, 1876, § 2508. And after the lapse of eighteen months from the grant of letters, if all the debts are paid, “and the condition of the estate, in other respects, will admit of it,” a final settlement may be required, either at the instance of those interested, or *ex mero motu*, by the action of the court. After citation served upon an executor or administrator to this end, requiring him to file his accounts and vouchers, and to make settlement, he may be compelled by attachment to obey the order of the court, or the judge of probate may proceed to state an account against him. Code, §§ 2528, 2524, 2525; *Hooper v. Smith*, 57 Ala. 557; 1 Brick. Dig. p. 981, §§ 950 *et seq*.

The jurisdiction of the probate court in this case did not, therefore, depend on the petition of the appellees to compel the appellant, who was their co-executor, to make a settlement of his executorship.

John Cook, the appellant, was properly chargeable with the money deposited with him, or in his custody, by the testator during his life. When a debtor of an estate, or of a testator, takes out letters testamentary or of administration, the presump-

[Pugh v. Youngblood.]

tion of payment at once arises, without regard to the solvency of the debtor so appointed, or the duration of his administration.—*Miller v. Irby's Adm'r*, 63 Ala. 477; *Wright v. Lang*, 66 Ala. 389.

There was no authority, however, to enter a decree in favor of the co-executors against the appellant. The only case where a decree is authorized in favor of one personal representative against another, is where there is a removal, a resignation or revocation of the letters of an executor or administrator, or his authority ceases for any cause; in such case a decree may be rendered in favor of a remaining or succeeding executor or administrator.—Code, §§ 2590–91. The court erred in not rendering the decree in favor of the several devisees or legatees under the will.—Code, §§ 2530, 2475.

Reversed and remanded.

## Pugh v. Youngblood.

### *Statutory Action in the Nature of Ejectment.*

1. *Sale of lands for taxes; statute of limitation.*—The point of time, from which the bar of the statute, prohibiting the institution of an action for the recovery of lands sold for the non-payment of taxes after the expiration of five years from the date of sale (Code of 1876, § 464), is to be computed, is the date of the execution of the deed by the judge of probate, that being the final, consummating act of sale.

2. *Same; effect of the bar of the statute.*—When the purchaser of lands sold for taxes has continued in the open and continuous possession thereof, claiming title, for the period of five years from the execution of the deed of the judge of probate, the statute cuts off all inquiry into the regularity of the sale, and operates a bar to an action brought for the recovery of the land, whatever may be the recitals of the deed, or however erroneous they may be, or whatever may have been the irregularities attending the sale.

3. *Deed to purchaser of lands at tax sale is color of title, though invalid.*—Although a conveyance to the purchaser of lands sold for non-payment of taxes may not recite facts which would support the sale, and for that reason is invalid upon its face, such conveyance constitutes color of title, and possession taken and held under it is adverse, and will not only bar the entry of the true owner, but will ripen into an indefeasible title, if it be continued for the period prescribed by the statute of limitations.

APPEAL from Pike Circuit Court.

Tried before HON. JOHN P. HUBBARD.

This was a statutory real action in the nature of ejectment brought by B. F. Pugh and others, the appellants, against David Youngblood, M. T. Youngblood and J. E. H. Rushing,



[Pugh v. Youngblood.]

the appellees, and was commenced on the 5th day of May, 1881. The appellees, defendants in the lower court, pleaded, in short by consent, the general issue, and "the statute of limitations of five years under a tax title," and the cause was tried on issue joined on these pleas. On the trial, as shown by the bill of exceptions, the appellants, plaintiffs in the lower court, proved that they were the only heirs at law of Wade H. Pugh, deceased, who died in the county of Pike intestate in the year, 1870, seized and possessed of the lands sued for; that the defendants, at the time of the commencement of the suit and at the time of the trial, were in possession of the lands, and had been in the possession thereof for more than seven years before this suit was brought; and that "some of the plaintiffs were of full age at the time Youngblood went into possession and others arrived at age after he went into possession."

The defendants thereupon proved and read in evidence, against the plaintiff's objection, a deed executed by Willis C. Wood, the judge of probate of said county, to the defendant, David Youngblood, in 1874, conveying to him, as purchaser at tax sale, the lands in controversy. The recitals and terms of this deed are in substantial compliance with the form prescribed by the revenue law of 1868 (Pamph. Acts, 1868, p. 323), except that the recital, that "the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale, hereinafter named," is not contained in the deed. It was also shown that there was an error in the recital of the deed as to the time when the sale was made, the deed reciting that it was made in May, 1871, while the fact was shown to be, that it was made in May, 1872. Thereupon the court, on the defendants' motion, allowed Willis C. Wood, who was the judge of probate when the deed was made, but whose term of office had expired, to correct the mistake. The plaintiffs excepted to the admission of the deed in evidence, and also to the ruling of the court in allowing the deed to be corrected. It was also shown, that the defendant, David Youngblood, went into the possession of said land, under his purchase at the tax sale, in 1872, and that he and the other defendants to whom he sold and conveyed the lands had ever since that time been in the open and continuous possession thereof, claiming title thereto under the tax sale and the deed of the judge of probate made in pursuance thereof. The plaintiffs then offered to prove, that at the time the taxes for which the lands were sold became due, and from that time to the date of the sale, there was sufficient personal property "on the premises of the said Wade H. Pugh, deceased," to pay said taxes, and which could have been found by diligent search; but that no such search for personal property was made by the tax collector, and that he did not make

[Pugh v. Youngblood.]

any demand on them for the taxes, or for personal property out of which to make the taxes. But, on objection made by the defendants, the court refused to permit the offered proof to be made, and the plaintiffs excepted. The foregoing being substantially all the evidence, the court charged the jury, at the request of the defendants, that if they believed the evidence, their verdict must be for the defendants, to which the plaintiffs excepted.

Judgment was entered on verdict for the defendants, from which the plaintiffs appealed. The rulings of the Circuit Court above noted are here assigned as error.

WM. H. PARKS and M. N. CARLISLE, for appellants.

JNO. D. GARDNER, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The undisputed facts in the case are, that the lands in controversy were sold for the payment of taxes, one of the defendants becoming the purchaser, receiving from the tax collector a certificate of the purchase. The period for redemption having expired, a deed was executed to the purchaser, under which he and those claiming under him had been in the open possession of the lands, claiming them for more than five years before the commencement of this suit. The statute prohibits the institution of an action for the recovery of lands sold for the non-payment of taxes, after the expiration of five years from the date of the sale, with an exception of particular persons not material now to be noticed.—Code of 1876, § 464. We have heretofore decided, that the point of time from which the bar is to be computed, is the execution of the deed by the judge of probate; that is the final, consummating act of sale. The deed of the probate judge, by the revenue law, is made *prima facie* evidence of the facts recited in it, in all controversies relative to the land conveyed.—Code of 1876, § 460. This is the value of the deed as evidence before the expiration of the period of limitation to actions for the recovery of the lands. When that period has expired, and for it there has been open, continuous possession, with a claim of title, however erroneous may be the recitals of the deed—whatever may be the variances between its statements as to the years for which the taxes were assessed, and the assessment itself, or whatever may have been the irregularities attending the sale, the statute operates a bar to the action, and was intended to foreclose all inquiry into the regularity of the sale. *Pillow v. Roberts*, 13 How. 472. The purposes of the statute,

[Pugh v. Youngblood.]

the evils it was intended to cure, can not be misapprehended. By the common law a purchaser at tax sale, though having a conveyance from the proper officer reciting fully a compliance with all the provisions of the revenue law upon which the authority to sell depended, was bound to prove a strict compliance with them by evidence independent of the recitals of the conveyance, or he could not recover the lands, and lost the sum he had bid and paid. The consequence was, that it was but seldom such titles could be supported, and they became almost, if not quite valueless. The owners of real estate neglected the payment of taxes, speculating upon the probabilities of the invalidity of sales for the payment, and the difficulty of proving their validity, when every condition had been performed, and every requisition of the law had been met. Therefore, the legislature deemed it wise to declare, as they had undoubted power to declare, not that the recitals of the deed of the judge of probate should be conclusive, but that they should be *prima facie* evidence of the facts recited—of the regularity of all proceedings.

An outstanding conveyance, made on a sale of lands for the payment of taxes, casts a cloud upon the title, embarrassing alienation. Though it may not have recited facts which would support the sale, and was therefore invalid upon its face, it was color of title; and a possession taken and held under it was adverse, and if continued for the period prescribed by the statute of limitations, would not only bar the entry of the true owner, but ripen into an indefeasible title.—*Dillingham v. Brown*, 38 Ala. 311. To give repose to all such titles, however irregular may have been the sales, when accompanied by possession; or if not accompanied by possession, to quiet all litigation springing from them within a limited, defined period—within a period in which all facts could be ascertained and proved, is the purpose of the statute limiting actions to five years. If for that period the purchaser or his assignee permits the owner to remain in possession, claiming title, however formal may be his conveyance, however regular may be the sale, however valid the title he acquired, the statute intervenes and bars his right of recovery; and if the owner permits the purchaser for that period to remain in possession, claiming title, however irregular may have been the sale, whatever may be the imperfections or inaccuracies of the recitals of the conveyance, the statute protects the possession.—*Pillow v. Roberts*, *supra*; *Edgerton v. Bird*, 6 Wis. 527. The defendants having been, anterior to the commencement of suit, in uninterrupted possession, claiming title, for a period of more than five years after the execution of the conveyance, all inquiries into the regularity of the sale—into the conformity of the recitals of



[Jones v. Hilliard.]

the conveyance to the assessment, or to the certificate of purchase, were foreclosed. It is unnecessary, therefore, to consider the several rulings of the Circuit Court, to which exceptions were reserved. If there be error in them, it is error without injury. Litigation would be unnecessarily protracted, if judgments were reversed because of errors harmless to the party complaining, which, if not committed, could not, and ought not not to have altered the judgment rendered.

Affirmed.

## Jones v. Hilliard.

### *Application far Mandamus.*

1. *Sale of intoxicating liquors ; its regulation by legislation.*—The sale of intoxicating liquors has long been considered in this State a legitimate subject of police regulation ; and it is in the power of the legislature to impose restrictions thereon.

2. *Same ; special act construed.*—An act of the General Assembly requiring that an applicant for a license to retail vinous, spirituous or malt liquors within a prescribed territory, should procure the recommendation of a majority of the householders and freeholders of the precinct or ward in which he proposes to carry on the business, and furnish satisfactory evidence thereof to the probate judge, is not inoperative because it does not provide any means or machinery for procuring such recommendation, or furnishing such evidence. A compliance with the act is not impossible, although it may impose labor and expense on the applicant.

### APPEAL from PIKE Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

Under the provisions of an act entitled "An act to amend section 1544 of the Code of Alabama, so far as the same relates to the counties of Pike, Butler and Coffee," approved March 1st, 1881 (Pamph Acts, 1880-1, p. 182), no license must be granted to sell vinous, spirituous or malt liquors in the counties of Pike, Butler and Coffee, unless the applicant obtain the recommendation of a majority of both the householders and freeholders of the election precinct or ward where such person desires to sell such liquors, and also furnish to the judge of probate satisfactory evidence that the signatures of the parties so making the recommendation are genuine, and that the signers are resident householders and freeholders of such precinct or ward. No machinery is, however, provided by the act for obtaining such recommendation or for furnishing such evidence. The appellant, a resident of the city of Troy, in Pike county, desiring to obtain a license to retail vinous, spirituous and malt

[Jones v. Hilliard.]

liquors therein, applied to the appellee, as the judge of probate for said county, for a license for that purpose, he having complied with the provisions of section 1544 of the Code of 1876, and tendered the sum required by the statute to be paid for such license. The appellee refused to issue the license on the ground that the appellant had not complied with the provisions of the special act for that county; and thereupon the appellant applied to the judge of the circuit court for a *mandamus* to compel the appellee to issue the license. To the petition the appellee interposed a demurrer, which was sustained by the court, and the petition was dismissed. The judgment of the Circuit Court is here assigned as error.

JOHN D. GARDNER, for appellant.—The incompleteness, impracticability and absurdity of the statute in question, are fatal to its validity. It is incomplete in that, (1) there are no means furnished by the act for ascertaining who are the householders and freeholders of the precinct or ward, or the number of them; (2) there are no means provided by which an issue can be framed, or the questions arising under the act can be litigated; (3) or for obtaining the evidence required by the act; and (4) the power conferred on the judge of probate is purely arbitrary. The following cases are cited: *Ex parte Burnett*, 30 Ala. p. 468; *Campbell's case*, 20 Amer. Decisions, 360; *U. S. v. Cantril*, 4 Cranch. 167; Dwarries on Statutes, Rules 9 and 10, p.144.

RICE & WILEY, *contra*.—(1). The power of the legislature to prohibit, as well as to restrain, by proper regulations, the sale of intoxicating liquors, is well settled.—*License Cases*, 5 How. (U. S.) 504; *McGuire v. The Commonwealth*, 3 Wall. p. 387; *License Tax Cases*, 5 Wall. 462; *Pervear v. The Commonwealth*, 5 Wall. p. 475. (2). While compliance with the provisions of the statute in question may impose trouble, expense and inconvenience, yet it is not impossible to perform the conditions prescribed thereby. It is not, therefore, invalid.

STONE, J.—Under the legislative policy of this State, as in many other States, the sale of intoxicating liquors by retail has long been considered a legitimate subject of police regulation. The legislature has power to impose restrictions on this species of traffic, and, in localities, may interdict the sale entirely. *Dorman v. The State*, 34 Ala. 216; 1 Dillon on Mun. Corp. § 363; *License Cases*, 5 Wall. 462; 1 Dil. on Mun. Corp. § 44. Counsel do not controvert this proposition. The precise objection to the enforcement of the act "to amend section 1544 of the Code of Alabama, so far as the same relates to the counties of Pike, Butler and Coffee," approved March 1, 1881 (Pamph.

[Wilson v. Stewart.]

Acts, 1880-1), is, that it provides no means, or machinery for procuring the recommendation of the householders and freeholders, and of furnishing evidence of the same to the judge of probate. A compliance with this prerequisite may impose labor and expense on the applicant, but the condition is not impossible of performance. The statute casts on the applicant the duty of furnishing the necessary evidence, and we know of no rule, constitutional or otherwise, for declaring it inoperative. *Sadler v. Langham*, 34 Ala. 311.

The judgment of the Circuit Court is affirmed.

## Wilson v. Stewart.

*Action on the Case by Landlord against Purchaser of Crop from Tenant.*

1. *Pleading ; misjoinder of counts.*—The rule of the common law, that counts *ex contractu* and counts *ex delicto* can not be joined, still prevails.

2. *Same ; amendment causing misjoinder may be stricken from the file.*—An amendment to a complaint containing counts in case and trover, by which it is proposed to add the common counts in assumpsit, would cause a misjoinder ; and while in such case the better practice is to put the defendant to his demurrer, as the demurrer would necessarily be sustained to the entire complaint, striking the amendment from the file is at most error without injury.

3. *Landlord and tenant ; when relation exists ; landlord's lien.*—A contract by which one rents to another land, to be cultivated for a stipulated part of the crops to be grown thereon, creates between them, under the statute, the relation of landlord and tenant, with all its rights and incidents, including the lien of the landlord for rent and advances.

4. *Same ; nature of landlord's lien.*—The lien of the landlord on the crops of his tenant is merely a statutory right to charge the crops with the payment of rent and advances in priority to all other rights or liens ; while the property and right of property in the crops remain in the tenant, thus enabling him to make a *bona fide* sale to a purchaser without notice, which would prevail over the landlord's lien.

5. *Purchaser from tenant ; when without notice.*—Notice by a purchaser from the tenant that the crop was raised on land rented from the landlord, and that the rent was unpaid, does not operate as notice that the landlord had advanced to the tenant, or of his lien therefor.

APPEAL from Cherokee Circuit Court.

Tried before Hon. LEROY F. BOX.

This was an action brought by the appellant against the appellee, and was commenced on 18th June, 1880. The original complaint contained three counts, one in trover, and the other two in case. The substance of the averments of the counts in case is that the plaintiff in the court below rented lands to one



[Wilson v. Stewart.]

Tillery for and during the year 1879, and made advances to him during that year under the statute, to enable him to make a crop; that Tillery made a crop of cotton on the rented premises during that year, which he delivered to the defendant, without having first paid the amounts due from him to the plaintiff for rent and advances, and that defendant, with notice of plaintiff's lien for rent and advances, received and sold the cotton, and thereby "plaintiff's lien was lost or destroyed." Afterwards, the plaintiff having, by leave of the court, amended his complaint by adding two counts in assumpsit, one on an account stated, and the other for money had and received, the defendant moved the court to strike the amendment from the file, which motion was granted by the court, and the plaintiff excepted. The defendant pleaded the general issue, payment, and the statute of limitations of one year, and upon the issues thus made the cause was tried.

The evidence introduced on the trial tended to show, that the plaintiff rented lands to Tillery for and during the year 1879, to be cultivated in cotton and grain, "at the agreed price of one-third the corn or grain and one-fourth the cotton grown by him" on the rented premises during that year; that Tillery raised thereon a crop of cotton during that year, and delivered it to the defendant, a merchant, who had also advanced to him during the year, and who shipped and sold the cotton, and received the proceeds of the sale; that Tillery had also rented lands from the plaintiff during the year 1878, and during that year, as well as during the year 1879, plaintiff had advanced to him under the statute, to enable him to make his crops, and at the commencement of this suit Tillery was indebted to plaintiff on account of such advances in the sum of \$103.00, which was a "balance struck on settlement between them" for both years; that the defendant, at the time he received the cotton, had notice that it had been raised by Tillery on lands rented from the plaintiff, and that the *rent* had not been paid; but he had no notice that the plaintiff had *advanced* to Tillery, or that the latter owed the plaintiff on account of such *advances*, until after he had disposed of the proceeds of the sale of the cotton; that from such proceeds, defendant, after deducting the amount due him from Tillery for advances which he had made the latter during the year 1879, paid the plaintiff the amount of his rent, and the balance, "\$55.00 or more," he paid over to Tillery. The evidence does not disclose how much defendant advanced to Tillery, nor how much he received for the cotton sold by him.

Numerous exceptions were reserved to the general charge, to the charges given at the request of the defendant, and to the refusal of the court to charge as requested by the plaintiff in

[Wilson v. Stewart.]

writing; but the opinion renders it unnecessary to set out these charges. The jury returned a verdict for the defendant, on which a judgment was rendered in his favor. The striking the amendment from the file, and the rulings of the court on the charges to the jury, are here assigned as error.

WALDEN & SON, for appellant.—(1). The counts were properly joined.—*Spence v. Thompson*, 11 Ala. 746. If, however, there was a misjoinder, this could only be reached by demurrer to the whole declaration.—*Ragsdale v. Bowles*, 16 Ala. 62. (2). The landlord did not lose his lien because of a removal of the crop from the rented premises.—*Lomax v. Le Grand & Co.*, 60 Ala. 537; *Governor v. Davis*, 20 Ala. 366.

JAMES H. SAVAGE, *contra*.

BRICKELL, C. J.—The original complaint was in case, joining a count in trover. The amended complaint proposed to add the common counts in assumpsit, thereby causing a misjoinder, rendering the entire complaint subject to demurrer. For the rule of the common law remains unchanged, that counts *ex contractu* and counts *ex delicto* can not be joined.—*Whilden v. M. & P. Nat. Bank*, 64 Ala. 1. It may be the better practice would have been to put the defendant to his demurrer, but as that would of necessity have been sustained to the entire complaint, striking the amendment from the files is at most error without injury.

The relation of landlord and tenant, with all its rights and incidents, existed between the appellant and Tillery by force of the statute.—Code of 1876, §3474. As an incident to the relation, a lien on the entire crops grown on the rented premises, resulted to the appellant for the share of the crops it was agreed that he should receive as rent. He had also a lien on the crops for such advances as he made Tillery to aid in the cultivation of the crops, and for any balance due him from Tillery for advances made during the tenancy of the preceding year. These liens were capable of enforcement by attachment at law, on the happening of any of the contingencies expressed in the statute. Code of 1876, §§ 3467–78. The lien is not property, or a right of property. It is a statutory, legal right to charge the crops with the payment of the rents, or advances, or both, in priority to all other rights or liens, the property and right of property remaining in the tenant.—*Stern v. Simpson*, 62 Ala. 194. If with notice of the liens, the appellee sold and converted the crops, depriving the appellant of, or rendering unavailing the remedy by attachment to enforce them, an action on the case can be supported for the recovery of the resulting damages.

[Bank of Mobile v. Mobile and Ohio Railroad Co.]

*Hussey v. Peebles*, 53 Ala. 432; *Lavender v. Hall*, 60 Ala. 214; *Lomax v. Le Grand*, *Ib.* 537. Notice of the liens must, however, be traced to the appellee. The general property in the crops residing in the tenant, he could make a *bona fide* sale to a purchaser without notice, which would prevail over the liens. This is an infirmity of the liens by the words of the statute creating them. The fatal defect in the case of the appellant, in all its aspects, is that the appellee sold the cotton and disposed of the proceeds of the sale, without any notice of the lien now claimed for advances. Of the lien for rent, notice was given, but it is undisputed that the rent was paid, and no claim for it is now made in this suit. Against the lien for advances the statute affords the appellee full protection. If there be error in the various rulings of the court below to which exceptions were taken, it is not of injury to the appellant, and it would serve no useful purpose to examine them.

Affirmed.

## Bank of Mobile v. Mobile and Ohio Railroad Company.

*Bill in Equity to compel Railroad Corporation to issue Certificate of Stock.*

1. *Judgment inter partes ; its effect.*—A judgment *inter partes*, not reversed and not successfully assailed for fraud or on some other ground, is conclusive against the parties thereto who are properly before the court,—against the defendant, that the amount adjudged is due, and against the plaintiff, that no more is due, on account of the contract or liability sued on.

2. *Judgment ; cause of action merged therein.*—Where a compromise was made between the parties pending a suit brought against a municipal corporation by the holder of bonds issued by such corporation, for the purpose of enforcing the collection of the bonds held by him, by which an amount of recovery less than the face of the bonds, and time of payment were agreed on, and afterwards a judgment was entered in the cause pursuant to the compromise, and carrying its stipulations into execution,—the effect of such compromise and the judgment thereon, was to merge the municipal corporation's liability on the bonds in the judgment, thereby destroying the bonds as a cause of action, and leaving the judgment as the only legal evidence of indebtedness from such corporation to the plaintiff growing out of that transaction. And such a judgment would be a bar to any effort made to collect the alleged balance on the bonds so compromised.

4. *Judgment taken on compromise in full satisfaction of cause of action ; effect of.*—The effect of an express term of such compromise and the judgment thereon, that the judgment rendered in pursuance of the compromise was in full satisfaction of the bonds and coupons held by the



[Bank of Mobile v. Mobile and Ohio Railroad Co.]

plaintiff, was to leave the parties as if the plaintiff had never owned or asserted a greater claim against the defendant, than shown by the judgment recovered.

4. *Subrogation of securities ; when doctrine can be invoked.*—The doctrine of subrogation of securities presupposes an existing indebtedness or liability ; and it can only be invoked by a creditor or one under liability.

5. *Written contract ; when varied by oral agreement.*—Where, by the terms of a written agreement of compromise of a pending suit against a town, on bonds issued and delivered by it to a railroad corporation, as security for stock subscribed by the town, and by the railroad corporation assigned to the plaintiff, a judgment for a specified amount, which was less than the face of the bonds, was to be taken by the plaintiff in full satisfaction of the bonds, and no mention was made in such agreement of the stock for the security of which the bonds were issued,—a contemporaneous oral agreement to the effect, that the town, as a part of the consideration moving the plaintiff to make the compromise, was also to transfer to the plaintiff stock in the railroad corporation amounting to eight thousand dollars, would vary, and add an important term to, the written contract, which the law does not allow.

#### APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in this cause was filed on the 7th of August, 1880, by The President, Directors and Company of the Bank of Mobile, a corporation under the laws of this State, against the Mobile and Ohio Railroad Company, a corporation created by and existing under the laws of Alabama, Mississippi and other States, and the town of Starkville, located in, and a municipal corporation under the laws of, the State of Mississippi ; and the case made thereby may be stated as follows: The town of Starkville, under authority conferred by the laws of Mississippi, subscribed to the capital stock of the Mobile and Ohio Railroad Company in the amount of \$25,000, and issued and delivered to the company its bonds to that amount, and obtained a certificate therefor from said company, which is in the following language: "The town of Starkville is entitled to two hundred and fifty shares of the capital stock of this company, in payment of twenty-five thousand dollars of the bonds of said town this day delivered to this company, and which said bonds were issued for the purpose of aiding in the building of a branch road from Artesia west by way of Starkville. The above amount of stock is placed to the credit of said town on the books of this company, and will be transferred from time to time, and and in such amounts and to such persons, as the legal authorities may direct in writing." The "said certificate," as the bill avers, "is in harmony with the charter of said company and nothing therein contained deprives the president and directors of the control of the stock subscribed by said town, and their right to hold the same in trust under section 14 of said charter as security for the payment of the subscription, and enables the

[Bank of Mobile v. Mobile and Ohio Railroad Co.]

company to issue certificates of stock, from time to time, as the subscription shall be paid up, as intended by the charter." This section of the charter enacts, as the bill avers, "that the directors of said company may require the payment of the sum or sums subscribed to the capital stock of said company, at such times and in such proportions, and upon such conditions as they may deem fit; and in case any stockholder shall refuse or neglect to make payment pursuant to the requisition of the directors, the stock of such stockholder, or so much thereof as may be necessary, may be sold by the directors of said corporation at public auction, after the lapse of ninety days from the time when payment became due."

The bonds were payable to the company, or bearer, at the Bank of Mobile, in this State, and bore interest at the rate of seven per cent. per annum, payable semi-annually, for which coupons were attached. Afterwards the complainant purchased \$16,000 of these bonds, and, the town of Starkville having defaulted in the payment of interest thereon, the complainant commenced suit in the United States District Court for the Northern District of Mississippi, to enforce the collection of the past due coupons off of said bonds. After this suit was begun, the complainant and the town of Starkville entered into a written agreement of compromise of the bonds and coupons owned by the complainant, by which it was agreed, that the complainant should, at the next term of the court in which said suit was pending, have and take a judgment against said town for an amount stated in the agreement, which was therein estimated to be fifty per cent. of the face of the bonds and matured coupons held and owned by complainant; that said amount was to be paid in four annual installments in amounts and at times stated in the agreement, and that the complainant was "to take the judgment as before herein set forth in conformity with the figures and dates of payment as above specified in full satisfaction of the bonds and coupons thereto attached and herein before described and now held by the Bank of Mobile," the complainant. On the 9th of December, 1878, a judgment was entered in said court in favor of the complainant and against said town in conformity with the terms of the agreement of compromise. Copies of the agreement and of the judgment-entry are made exhibits to the bill. In the written agreement no mention is made of the stock, for which the bonds were issued; but the complainant sets up in the bill a contemporaneous oral agreement between it and said town by which it was to receive, as one of the considerations moving it to make the compromise, eighty of the two hundred and fifty shares of stock which said town had subscribed for; the averments in reference to which are stated in the opinion. The bill further

[Bank of Mobile v. Mobile and Ohio Railroad Co.]

alleges that it was the duty of said railroad company to enforce the terms of the subscription, "to withhold stock to said town in proportion to the amount of subscription which the latter fails to pay by virtue of said compromise, and to issue the same to said Bank of Mobile, which was subrogated to all the rights of said company, in the transfer of said bonds, that said eighty shares are now the property of said Bank of Mobile, just as they would have been of the Mobile and Ohio Railroad Company in case the latter had retained said bonds and made the compromise before the transfer of the bonds. And this complainant now demands and claims in the name of said Mobile and Ohio Railroad Company, that the directors of said company" issue to complainant "the stock to which it is entitled as above set forth." It is also averred in the bill, that the town of Starkville "claims that the repudiation of a large portion of said subscription did not affect her right to receive said 250 shares of stock, is now demanding the whole 250 shares from said company, has already received more of said stock than the principal of the bonds paid up to date, and that said company, if not restrained by this Honorable Court, will soon issue the entire 250 shares to the town of Starkville; that said town had been enjoying splendid advantages from said branch road since 1873, and "that it is unconscionable and inequitable for said town to enjoy" such advantages, "to repudiate a large portion of said subscription, and then to demand and to receive the whole 250 shares just as if the entire subscription had been met in good faith." The bill does not show whether the judgment rendered on said agreement of compromise had been paid or not.

The prayer of the bill is for an injunction restraining the issuance of any additional shares of the stock of said railroad company to the town of Starkville, until the rights of the respective parties thereto had been settled, and that said company issue to complainant eighty shares of said stock and "deduct a like number from the 250 shares to have been issued to said town of Starkville;" and for general relief. An injunction was prayed for in the bill. The town of Starkville demurred to the bill, assigning several grounds of demurrer, the substance of which was, that it appeared from the bill, that said bonds were issued to the Mobile and Ohio Railroad Company in payment for the 250 shares of the stock of said company subscribed for by said town, and that the complainant failed to show that it had any right, title or equity to any of said stock. The Chancery Court entered a decree sustaining the demurrer, dissolving the injunction and dismissing the bill, which is here assigned as error.



[Bank of Mobile v. Mobile and Ohio Railroad Co.]

WM. G. JONES, with whom was GEO. E. CRITZ, Esq., of Starkville, Miss., for appellant.

RICHARD P. DESHON, *contra*.

STONE, J.—When the town of Starkville issued its bonds, and placed them with the Mobile and Ohio Railroad Company as guaranty and security for the payment of the twenty-five thousand dollars stock it had subscribed in said railroad corporation, there can be no question that the railroad company retained the control of the stock, in the nature of a lien, to secure the payment of the bonds. In other words, the town of Starkville could not compel the railroad company to issue the certificates of stock, except as it first made payment of the bonds. And it may be conceded that when the railroad company traded and transferred the bonds to the bank of Mobile, the latter corporation succeeded to the equitable rights and lien of the railroad company; and, if necessary to the collection of the debt evidenced by the bonds, could have successfully asserted its right to the security the railroad company had retained on the stock subscribed by the town of Starkville, not then issued. That is not this case. After the default of the town of Starkville in not paying its interest coupons, the bank brought suit to compel their payment, as it had a clear right to do. Pending that suit, the bank and the town agreed on the terms of a compromise, reduced it to writing, and executed it with their several corporate seals, which agreement is made part of the bill. A judgment was thereupon entered up in said cause pursuant to said compromise, and carrying its stipulations into execution. The effect of that compromise and the judgment thereon, was to merge the town's bond liability in the judgment—to destroy the bonds as a cause of action, and to leave the judgment as the only legal evidence of indebtedness from the town to the bank, growing out of that transaction. Any effort to collect the alleged balance of that bond debt, would have been defeated by a plea of former recovery; for a judgment *inter partes*, not reversed, and not successfully assailed for fraud, or on some other ground, is conclusive against each party, who is properly before the court; against the defendant, that the amount adjudged is due, and against the plaintiff, that no more is due on account of the contract or liability sued on. *Crawford v. Simonson*, 7 Por. 110; *Trustees v. Keller*, 1 Ala. 406; *Herndon v. Givens*, 16 Ala. 261; *Mervine v. Parker*, 18 Ala. 241; *Wittick v. Traun*, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504; *Lyon v. Odom*, 31 Ala. 234; *Moore v. Appleton*, 34 Ala. 147; *Bobe v. Stickney*, 36 Ala. 482; *Durr v. Jackson*, 59 Ala. 203.

[Bank of Mobile v. Mobile and Ohio Railroad Co.]

The present case is stronger even than this. An express term of the compromise and judgment thereon was, that the bank of Mobile was to take judgment in conformity with the figures and dates agreed on and specified, "in full satisfaction of the bonds and coupons thereto attached . . . and now held by the bank of Mobile." The effect of this agreement and judgment was, to leave the parties as if the bank had never owned or asserted a greater claim against the town of Starkville, than that shown by the judgment recovered. — *Masser v. Strickland*, 17 Amer. Dec. 668; *Coit v. Tracy*, 20 Amer. Dec. 110.

We need not and do not declare what would be the bank's rights against the stock still held by the railroad company, should it become necessary to resort to it as a means of enforcing the collection of the judgment it recovered against the town of Starkville. That is not the purpose of this bill. On the contrary, the present bill prays that the bank be subrogated to the railroad's lien on the stock, to secure the payment of the residue of the bonds not embraced in the judgment, when by the solemn agreement of the parties and judgment of the court, no such unpaid balance of indebtedness exists. There being no debt, there can be no ground for subrogation of securities. Only a creditor, or one under liability, can invoke the doctrine of subrogation.—1 Sto. Eq. Jur. § 635; *McMullen v. Neal*, 60 Ala. 552, and authorities cited.

There is an averment in the bill, not very distinctly made, that one of the considerations moving to the bank in acceding to the compromise, was that it should receive eighty of the two hundred and fifty shares of stock the town of Starkville had subscribed for. This number of shares properly represents the proportion of the stock, which corresponds with the percentage of the bonds the bank surrendered in the compromise. The averment continues: "Mr. Caruthers, representing said town as their attorney in said compromise, fully agreed with said bank of Mobile, that said town, as a matter of law and justice, would relinquish to said bank of Mobile stock to be issued under said subscription to the amount cancelled by the compromise; that the latter proposition was not incorporated in said written agreement, because the latter was intended as the basis of said judgment; that said proposition and agreement for this complainant to have said stock, being simply part of the consideration moving the latter to the compromise, and being so obviously reasonable and just, it was not considered necessary to reduce the same to writing; and complainant avers it was fully understood at the time of making said compromise, by all the parties thereto, that the stock to be issued to said town would be reduced in proportion to the principal of the bonds

[The State of Alabama ex rel. Pinney v. Williams.]

cancelled by the compromise." It will be remembered that the written agreement of compromise is made part of the bill, and that it contains the stipulation that the judgment to be rendered pursuant to its terms, was to be taken and received "in full satisfaction of the bonds and coupons" held by the bank of Mobile, and embraced in that suit. Not a word is said in the written agreement of compromise about the issue of any stock to the bank of Mobile, or of its right to claim the same. It requires the aid of liberal intendments, to reach the conclusion that what is stated in the bill amounts to an averment that the obligation was ever entered into by the town of Starkville to have any of the railroad stock issued to the bank of Mobile.

But if there was such outside oral agreement or understanding, can it be enforced? The written contract says the sum of the judgment to be confessed (specifying the exact amount), was to be in full satisfaction of the bonds and coupons. The oral agreement, if sufficiently averred, shows there was to be a transfer of stock in addition, amounting to eight thousand dollars. This would vary, and add a very important term to the written contract, which the authorities do not allow.—*Clark v. Hart*, 57 Ala. 390; *Hart v. Clark*, 54 Ala. 490; *Dupuy v. Gray*, Min. 357; *Somerville v. Stephenson*, 3 Stew. 271; *Mead v. Steger*, 5 Por. 498; *Hair v. La Brouse*, 10 Ala. 548; *Bryant v. Stephens*, 58 Ala. 636; *Winston v. Browning*, 61 Ala. 80; *Couch v. Woodruff*, 63 Ala. 466; *Broughton v. Mitchell*, 64 Ala. 210; *Skinner v. Hendrick*, 1 Amer. Dec. 43; 1 Chit. Contr. 140.

Affirmed.

## The State of Alabama ex rel. Pinney v. Williams.

*Petition for Mandamus to Compel Probate Judge to Render  
and Record Decree.*

1. *Mandamus; a civil remedy.*—Though the origin of the writ of *mandamus* was to prevent disorder from a failure of justice and defect of police, and it is issued in the name of the sovereign, yet its purpose is the enforcement of civil rights, and it can, in no wise, be regarded as a criminal procedure, but is strictly civil in its character.

2. *Probate courts; when inferior tribunals.*—Probate courts in this State are inferior tribunals, as compared with the circuit courts, or with city courts having co-extensive jurisdiction, within the meaning of *subdiv.* 3, of § 657 of the Code of 1876.



[The State of Alabama ex rel. Pinney v. Williams.]

3. *City Court of Mobile ; has power to issue writs of mandamus.*—The City Court of Mobile, having a jurisdiction, in all cases of a civil nature, identical and co-extensive with that of the circuit courts, excepting only the power to try titles to land, has the power to issue writs of *mandamus* to probate courts, or to the judges thereof, in all cases warranted by the principles and usages of law.

4. *Mandamus ; its mandate when applied to judicial acts.*—The writ of *mandamus* will lie from a superior to an inferior court, in a proper case, to compel it to *hear and decide* a controversy of which it has jurisdiction, or, where the cause has been heard, to compel such inferior court to *render judgment or enter a decree* in the given case. But it will not lie to direct *what particular judgment or decree* shall be rendered in a pending cause, or to re-examine or correct errors in any judgment or decree so rendered.

5. *Same ; compliance with mandate may be shown by return thereto.*—A respondent in a proceeding for *mandamus*, may comply with the mandate of the alternative writ, or question its sufficiency, *in law*, by demurrer or motion to quash, or, *in fact*, by plea or answer. When he elects to obey the writ, it is sufficient to set forth this fact by way of return, averring, with sufficient certainty and clearness, his compliance with the mandate of the court, substantially “following the mandatory clause of the writ, and stating his performance of the duty as by the writ commanded.”

6. *Same ; when answer thereto sufficient.*—An answer to an alternative writ of *mandamus*, issued on a petition seeking to compel a probate judge to render and enter of record the decree of the court, in a cause therein pending and before him on submission for decree, which shows that the respondent has complied with the mandate of the writ, by rendering and entering of record the decree of the court, as commanded, is sufficient return to such writ, leaving no room for the operation of a peremptory writ.

7. *Same ; when replication to answer defective.*—A replication to such an answer, admitting the rendition and record of the decree, but averring that it had been rendered and recorded since the issuance of the alternative writ, and that the decree had been antedated in such a manner as to deprive the relator of the benefit of a bill of exceptions on appeal, is a manifest departure from the case made by the petition, and is therefore fatally defective.

APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The petition in this cause was filed on the 26th October, 1881, and, on the 28th day of the same month, an alternative writ of *mandamus* was issued in accordance with the prayer of the petition. An answer was filed by the respondent to the writ, to which the relator demurred. The court overruled the demurrer, and the relator then filed a replication. The respondent interposed a demurrer to the replication, which was sustained by the court. The petition, answer and replication are sufficiently set forth in the opinion. On the hearing, had on petition and answer, the City Court rendered judgment refusing the peremptory writ and dismissing the petition ; and from this judgment the relator appealed, and here assigns as error said judgment and the rulings of the court on the demurrers.

C. J. TORREY, D. H. LAY and L. H. FAITH, for appellant.  
(1.). The alternative writ was properly granted in vacation.

[The State of Alabama ex rel. Pinney v. Williams.]

Code, § 658; *Ex parte Henderson*, 43 Ala. 392; High on Ex. Remedies, § 513. (2). The power and jurisdiction of the City Court of Mobile is co-extensive with that of the circuit court so far as this writ is concerned.—Acts, 1871–2, p. 109; Act Feb'y 7, 1852. (3). The petition on its face authorized the issuance of the alternative writ.—High on Ex. Remedies, §§ 147 and 186; 2 Brick. Digest, pp. 240–1–2. (4). The return to the alternative writ was evasive and not sufficient; and the demurrer thereto should have been sustained.—High on Ex. Remedies, §§ 464–74; *Smith v. Moore*, 38 Conn. 105; *Cortleyou v. Ten Eyck*, 2 Zabriskie, (N. J.) 45. (5). The demurrer to the replication should have been overruled. The probate judge could not properly, after service of the alternative writ on him, enter up a decree on the records and antedate it and in fact falsify his record. (6). As a matter of law there is no decree in the probate court, until the record shows it.—19 Ala. 319; *Ib.* 619; 20 Ala. 284; *Ib.* 364.

JAMES BOND and F. G. BROMBERG, *contra*.—(1). The City Court had no jurisdiction to issue the writ. (a). The act of 1868 (Pamph. Acts, 1868 p. 413) took away all civil jurisdiction. The act of 1872 (Acts, 1871–2, p. 109), again confers *civil* jurisdiction and the powers conferred are limited to those exercised by the circuit courts. *Mandamus* is not a civil remedy. The act of 1872, *supra*, is a mere *reference* statute, and such statutes only embrace *general* not *particular* powers referred to by them.—*Ex parte Green*, 29 Ala. 52; *Stevenson v. O'Hara*, 27 Ala. 362; *Mathews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Rex v. The Justices of Surry*, 2 Term Rep. 504; *School Board v. People*, 20 Ill. 525. (b). The probate court is no longer a court of inferior jurisdiction, and, therefore, the city court had no jurisdiction.—Con. 1875, Art VI, §§ 1 and 15; *Ex parte Dickson*, 64 Ala. 188; *Shadden v. Sterling*, 23 Ala. 518; *Dabney v. Mitchell*, 54 Ala. 198; *Blanton v. King*, 2 How. (Miss.) 856; *Root v. McFerrin*, 37 Miss. 47; *Ward v. State*, 40 Miss. 108; *Smith v. Hurd*, 7 How. (Miss.) 188; *Adams v. Adams*, 22 Vt. 50; *Sheldon v. Newton*, 3 Ohio St. 500; *Hess v. Cole*, 3 Zab. (N. J.) 116; *Snyder's Appeal*, 36 Penn. St. 168; *George's Appeal*, 12 Penn. St. 261; *Carmichael v. Browder*, 3 How. (Miss.) 252; *Brinker v. Brinker*, 7 Penn. St. 55; 1 Story's Eq. Jur. (10th Ed.) § 543, a. (2). *Mandamus* can only compel action; it can not raise or control the discretion and judgment of a tribunal, though inferior.—High on Ex. Rem. §§ 149, 150; *Ex parte Echols*, 39 Ala. 700; *Appling v. Bailey*, 44 Ala. 333; *Ex parte Smith & Schmidt*, 62 Ala. 252; *Ex parte Newman*, 14 Wall. 165; *Ex parte Perry*, 102 U. S. 183; *Ex parte Burtis*,

[The State of Alabama ex rel. Pinney v. Williams.]

103 U. S. 238. Nor will it lie to compel such tribunal to alter its record.—*Ex parte Henry*, 24 Ala. 650; High on Ex. Rem. § 154; *Ex parte Campbell*, 20 Ala. 89; *Ex parte Shaudies*, 66 Ala. 134; *Atkins v. Siddons*, 66 Ala. 453; *Dixon v. Judge*, etc. 4 Mo. 286; *King v. Justices*, etc. 5 Nev. & Man. 139. (3). Relator had complete remedy by motion and appeal; therefore, *mandamus* would not lie.—*Dabney v. Mitchell*, 54 Ala. 198; *Ex parte Gilmer*, 64 Ala. 234; *Bartlett v. Lang*, 2 Ala. 161; *Wilkerson v. Goldthwaite*, 1 S. & P. 159; *Ex parte Hendree*, 49 Ala. 360; *Ethridge v. Fuller*, 6 Ala. 58; *Hartley v. Chandler*, 6 Ala. 857; *Weed v. Weed*, 25 Conn. 337. (4). Although the Probate Court had not transcribed its decree on its minutes, it was in the power of the court to complete its entry. "The record is made up from the papers on file; and they are the record until final record is complete."—*Frazier v. Praytor*, 36 Ala. 691; *Hartley v. Chandler*, 6 Ala. 857; *Governor v. Bancroft*, 16 Ala. 605; Whart. Evidence, §§ 825-6; *Willard v. Harvey*, 24 N. H. 344; *Buffington v. Cook*, 39 Ala. 64.

SOMERVILLE, J.—This is a petition for the writ of *mandamus* against the judge of the probate court of Mobile, instituted by the relator, who shows an interest in the estate of one Solomon, of the settlement of which the probate court had taken jurisdiction. The averments of the petition show, that there had been a final settlement of the estate by the executor, one Werborn, after proper notice given as prescribed by the statute, on the 7th of May, 1881, and that the cause had been accordingly submitted to the probate judge for final judgment and decree, but that the court had failed and refused, on request made by motion, "to make and enter of record, on its minutes or other proper record book, any judgment or decree on said settlement," up to the date of the petition, which is October 27, 1881.

The prayer of the petition is for an alternative writ of *mandamus*, commanding the respondent "to presently *adjudicate and determine* the matters of said settlement, and at once to *make and enter of record*, on the minutes or other proper record book of said probate court, its judgment and decree, whatever the same may be," or else to appear on the first day of the next regular term of the city court, and show cause, if any, why he had not obeyed the mandate of the writ.

The rule *nisi*, or alternative writ, was issued as prayed for, its mandate being in substantial conformity with the prayer of the petition.

The answer of the respondent, Williams, as amended, alleges his compliance with the petition, averring that he *had adjudicated and determined* the matters of said settlement, and had en-



[The State of Alabama ex rel. Pinney v. Williams.]

tered his final decree of record, a copy of which is made an exhibit to the answer, and which purports to bear date July 11, 1881, to which date the matter of the settlement in question was alleged to have been continued by adjournment. The relator seeks, by replication to this answer, to show that the decree, though bearing date, July 11, 1881, was not legally rendered until November 5th, 1881, and then recorded, and was *antedated* by the judge, so as to improperly relate back to a term of the probate court which had already adjourned.

It is first insisted by appellee's counsel, that the City Court of Mobile has no jurisdiction to entertain or grant writs of *mandamus*, and especially that it possesses no supervisory control over the probate court, as an inferior or subordinate tribunal. In our opinion the contrary proposition is true, and the motion to dismiss the cause, based on this theory, must be overruled. We think the act of February 13, 1872, entitled "An Act to confer civil jurisdiction upon the City Court of Mobile" (Acts 1871-2, p. 109), is sufficiently clear in terms and broad in its language to confer such disputed jurisdiction. The second section this act reads as follows: "Sec. 2. *Be it further enacted*, That from and after the passage of this act, jurisdiction in *civil causes* (except in actions to try titles to land,) be and is hereby conferred upon the City Court of Mobile county, and *all powers of a civil nature*, now exercised by the *circuit courts* of the State and the judges thereof, be and are hereby conferred upon the City Court of said county and the judge thereof." The power to grant a writ of *mandamus* is clearly of a civil nature, the petition in such cases being much in the nature of a bill in chancery for specific performance. Though the origin of the writ was to prevent disorder from a failure of justice and defect of police, and it issued in the name of the sovereign, its purpose is the redress of civil rights, and it can, in no wise, be regarded as a *criminal* procedure. In *Ex parte City Council of Montgomery*, 64 Ala. 463, 468, this court, in effect, held such process to be strictly *civil* in its character.

It is equally plain that both city and circuit courts, having like jurisdiction in civil matters, can issue such writs to probate courts or probate judges in all cases warranted by the principles and usages of law. Probate courts are inferior courts of limited jurisdiction, from the decrees or judgments of which, in many cases, appeals are authorized to be taken directly to the circuit courts, as well as to the Supreme Court.—Code, 1876, §§ 3954, 3957. They are inferior and subordinate tribunals as compared with the circuit courts, or with city courts possessing co-extensive jurisdiction.—*Etheridge v. Hall*, 7 Port. 47. Circuit courts have power "to exercise a general superintendence over all inferior jurisdictions."—Code, § 657, *sub. div. 3*. They

[The State of Alabama ex rel. Pinney v. Williams.]

also have power to issue writs of *mandamus*.—Code, § 658. Circuit courts have uniformly exercised the power to issue writs of *certiorari* directed to the probate courts of this State, and such writs can be issued only from superior to inferior jurisdictions.—*Fowler v. Trewhit*, 10 Ala. 622; *Stout v. Ward*, *Ib.* 628; *Carrthorne v. Weisenger*, 6 Ala. 714. The City Court of Mobile has jurisdiction, in all cases of a civil nature, identical and co-extensive with that of the circuit courts under the constitution and statutes of the State, excepting only the power to try titles to land.—Acts 1871–2, p. 109.

From the final judgment of any circuit or city court, granting or refusing such remedial writs, an appeal is expressly authorized to be taken to this court.—Acts 1878–9, p. 150, § 3; Code, 1876, § 3923.

We conclude, therefore, that the court below had jurisdiction of the case as made by the appellant's petition.

But, in the particular aspect in which the case is presented, and the return made by the respondent to the rule *nisi* averring compliance with its mandate, we can see no error in the rulings of the court on the several demurrers, or in its final judgment refusing the peremptory writ and dismissing the petition.

The rules of law applicable to the case are simple and well settled. The writ of *mandamus* will lie from a superior to an inferior or subordinate court, in a proper case, to compel it to *hear and decide* a controversy of which it has jurisdiction; or, where the cause has been heard, to compel such inferior court to *render judgment* or *enter a decree* in the given case. But its use is not warranted to direct *what particular judgment* shall be rendered in a pending cause, nor is it the proper function of such remedial writ to re-examine, or correct errors in any judgment or decree so rendered. “The rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been *erroneously* performed. If the duty is unperformed, and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to *the manner* in which it shall be done; or if it be ministerial, the *mandamus* will direct the specific act to be performed.”—*Ex parte Newman*, 14 Wall. 152, 169; *High on Extr. Rem.* §§ 150–152, 266; *Ex parte Schmidt*, 62 Ala. 252; *Ex parte Mahone*, 30 Ala. 49. The principle, of course, universally prevails, that in no event will the writ ever be awarded where *full and adequate* relief can be had by appeal, writ of error, or otherwise.—*Ex parte South & North R. R. Co.*, 65 Ala. 599; *High on Extr. Rem.* § 10.

The sole design of the present petition, as conclusively shown both by its allegations and its prayer, is to compel the

[The State of Alabama ex rel. Pinney v. Williams.]

respondent, in his official capacity, as judge of probate, to render a judgment or decree in a pending cause, and enter the same of record as required by law.

The mandatory clause of the alternative writ, as usual in such cases, commands the respondent to *perform such act*, as prayed for by the petitioners, or else to show cause why it should not be done. The respondent thus has the option clearly to comply with the mandate of the writ, or to question its sufficiency *in law* by demurrer, or motion to quash, or *in fact* by plea, or answer. In other words, he may obey, or show proper excuse for not obeying. Where he elects to obey the writ, it is sufficient to set forth this fact by way of return, averring with sufficient certainty and clearness his compliance with the mandate of the court, substantially "following the mandatory clause of the writ, and stating his performance of the duty as by the writ commanded."—High on Extr. Rem. § 465.

The return or answer to the writ, made by the respondent in this cause, shows that he had adjudicated and determined the pending matters of settlement before him, and had entered his final decree of record, as required by the mandate of the writ. This was a sufficient return to the alternative writ, in the aspect of the case as made by the petition, and left no room for the operation of a peremptory writ making the rule *nisi* final. High on Extr. Rem. § 465; *Universalist Church v. Trustees*, 27 Amer. Dec. 267.

It is true that the replication and other pleadings in effect aver and admit that this judgment or decree was, in truth and fact, rendered on the 5th of November, 1881, and not on the 11th of July, 1881, as it purports to have been, and that it was erroneously dated, in such manner as to deprive the petitioner of the benefit of an appeal on bill of exceptions alleged to have been taken in proper time. These averments constitute a departure from the case as originally made by the petition. The purpose of this proceeding is to compel the respondent to *render and record* a decree. The new case, as sought to be made by the replication, is to have the *date of a decree corrected*, which had already been rendered and recorded. This is a manifest variance in the pleadings.

The argument may be sound, that a decree written out by the probate judge and not recorded, or filed in his office among the papers of the cause to which it relates, ordinarily, is not a valid or legal decree or judgment. So it clearly seems true that every such decree ought to be dated when it is filed in the office, as a paper in the cause, and not before or after, and that the dating of such decree is a mere ministerial act, as distinguished from the judicial act of its rendition, and the discre-



[Bradley v. The State.]

tionary power of determining its terms, conditions or contents. These propositions we are strongly inclined to favor, but as they are not before us necessarily for our consideration, we do not now undertake to decide them.

There is no error in the rulings or judgment of the City Court, and the judgment is affirmed.

## Bradley v. The State.

### *Indictment for Carrying Concealed Weapon.*

1. *Judgment of conviction in criminal case ; when erroneous.*—The sentence of a court in a criminal case, operating to deprive a citizen of his liberty, and condemning him to involuntary servitude, is irregular and erroneous, when it is in itself so vague and indefinite, that it may operate as a pretence of authority for prolonging the term of servitude beyond that to which the law gives sanction.

2. *Same.*—Where a defendant convicted for carrying a concealed weapon, is, in one part of the sentence, condemned to hard labor for the payment of the costs at the rate of forty cents per day, the term not to exceed eight months, and in another part, to hard labor for the same purpose for a term, not only in excess of eight months, but for a period more than sufficient for the payment of the costs, such sentence is inconsistent, uncertain, and erroneous, although the latter clause, being an excess of jurisdiction, may be void.

3. *Costs and fees ; distinction between.*—Costs and fees are generally altogether different in their nature, the one being an allowance to a party for expenses incurred in the successful prosecution or defense of a suit, while the other is a compensation to an officer for services rendered in the progress of a cause. But in criminal cases especially, under the statute, this distinction is not observed ; but all the costs which are taxable, except compensation to witnesses, consist of the fees fixed by statute for services rendered by the officers of court.

4. *Amendatory statutes ; their effect under the constitution.*—Under our constitutional provision, every amendatory statute is, in its nature, a revision of the statute amended, taking the place of the latter.

5. *Statutes ; construction of amendments to.*—It is a well settled rule of statutory construction, that, in the amendment, or revision, or in the re-enactment of statutes, the mere change of phraseology, or the mere omission of words which may well have been deemed redundant, does not indicate a legislative intent to change the pre-existing law ; and before the courts can pronounce a change in the law, such intent must be evident, and language must be employed, which is not susceptible of any other just construction.

6. *Costs in criminal case ; section 4731 of the Code, as amended, construed.*—The word *costs* when employed in reference to criminal prosecutions under our statutes, embracing *officers' fees*, the omission of these latter words from the statute amending section 4731 of the Code (Pamph. Acts 1880-81, p. 37), does not change or lessen the character of the liability which a defendant convicted of crime can be compelled to discharge by hard labor.

7. *Hard labor ; for what costs may be imposed.*—It is only costs incurred

[Bradley v. The State.]

by the State, or to which the State, if it were liable for costs, could be subjected, for the payment of which a convict may be compelled to labor; and hence, a defendant can not be sentenced, on conviction, to hard labor for the payment of fees due to his witnesses, or of fees due to the officers of court for services rendered to him in making his defense.

8. *Same; may be imposed for sheriff's fees for feeding prisoners.*—The compensation of the sheriff for feeding a defendant in a criminal case, while he is confined in jail to answer the indictment, is a part of the costs in the strictest sense of the term, taxable against him on conviction, and for the payment of which hard labor may be imposed.

9. *When judgment of lower court here corrected.*—The defendant in this case having been sentenced to hard labor for the payment of costs for a longer period than is authorized by law, the judgment of the lower court is here corrected, and, as corrected, affirmed, without costs.

APPEAL from Sumter Circuit Court.

Tried before Hon. W. S. MUDD.

The facts are stated in the opinion.

WATTS & SONS, S. H. SPROTT, and A. G. SMITH, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The appellant was convicted of the offense of carrying concealed weapons, the jury assessing against him a fine of one hundred dollars, to which the court added hard labor for the county for thirty days. The cost not being presently paid, nor judgment therefor confessed with good and sufficient sureties, the further sentence of the court was, that he do and perform hard labor for the county, “for such period, not to exceed eight months, as will be sufficient to pay said costs at the rate of forty cents per day. And it appearing to the court, that said costs amount to one hundred and twenty-four 60-100 dollars, composed of the following items, to-wit: Fees to the sheriff for feeding the defendant, while he was confined in jail after his arrest to answer the indictment in this case, thirty-seven 50-100 dollars; fees proved and allowed to witnesses summoned on behalf of the State, nineteen 40-100 dollars; and fees for witnesses summoned on behalf of the defendant, ten dollars; solicitor's fee, thirty dollars; clerk's fees, eight 85-100 dollars; sheriff's fees, exclusive of feeding while in jail, eighteen 85-100 dollars: It is ordered by the court, that said fees as above stated be taxed as costs against said defendant. And said costs not being paid, or judgment with security for the same not being confessed: it is ordered, that said defendant perform hard labor for the county for three hundred and eleven days, at forty cents per day, to pay said costs.”

The regularity and legality of the sentence and judgment is assailed in several respects, which will be specially considered.

[Bradley v. The State.]

The offense of which the appellant was convicted, is a misdemeanor, punishable by fine of not less than fifty, nor more than three hundred dollars, to which imprisonment in the county jail, or hard labor for the county for a term not exceeding six months, may be added.—Code of 1876, § 4109. The jury by their verdict ascertain and determine the amount of the fine. The court, in the exercise of a discretion dependent upon the facts and circumstances of the particular case, imposes the additional punishment of imprisonment or of hard labor. The costs not having been presently paid, or judgment with sufficient sureties confessed for fine and costs, the court, having adjudged that the facts of the particular case required that, in addition to the fine, the further punishment of hard labor for the county should be imposed, had authority to impose additional hard labor for the county, for a term *not exceeding eight months, to pay the costs*, estimating the compensation for the labor at *not less than thirty cents per diem for each day*.—Pamph. Acts 1880–81, p. 37.

The original statute authorizing the imposition of hard labor for the county, to pay the costs of a criminal prosecution, was section 4731 of the Code of 1876, which reads as follows: "If, on conviction before the county, circuit, or city court, judgment is rendered against the accused, that he perform hard labor for the county, and if the costs are not presently paid, then the court may impose additional hard labor for the county for a term sufficient to cover all costs and officers' fees, allowing not exceeding forty cents per diem for the additional labor imposed." This statute was amended by the act to which reference has been made, and the matter of amendment, so far as is now material, is, that hard labor, for the payment of costs in cases of conviction for misdemeanors, in no event can exceed the term of eight months, and the *minimum* of compensation for such labor shall be thirty cents per day; the former statute having fixed a *maximum*, omitting a *minimum* of compensation.

Certainty, consistency in all its parts is an indispensable element of the validity of judgments or decrees in civil cases, ascertaining and determining the rights and liabilities of parties. A judgment or a decree, uncertain, inconsistent in its terms, incapable of safe execution according to the letter of its mandate, is not valid.—*Dickerson v. Walker*, 1 Ala. 48; *Speed v. Cocke*, 57 Ala. 209. The sentence of a court in a criminal case, operating to deprive a citizen of liberty, condemning him to involuntary servitude, ought not to be less certain, less consistent in its terms, than the judgment or decree, which affects only his rights of property. When it is in itself so vague and indefinite that it may operate as a pretence of authority for prolonging the term of servitude beyond that to which the



[Bradley v. The State.]

law gives sanction, to say the least, it is irregular, invalid, and a court having jurisdiction is bound to reverse it. In one part of this sentence for the payment of costs, the appellant is condemned to hard labor for a term not exceeding eight months, the precise time not being expressed. The costs were ascertained to amount to one hundred and twenty-four 60-100 dollars, and the compensation for the labor is fixed at forty cents *per diem*. If for the costs, as taxed, the appellant could be subjected to hard labor, a term of eight months would not pay them, and if the sentence had not proceeded further, though it is the better practice to express directly and precisely the term of labor, under the practice which this court has sanctioned, it would have been construed as a valid sentence for the term of eight months. The sentence, however, proceeds further, and, in its concluding clause, condemns the appellant to hard labor for three hundred and eleven days to pay the costs, fixing the compensation at forty cents per day; a term, not only in excess of that which the law prescribes, but more than sufficient for the payment of the costs. This clause of the sentence may be void—an excess of jurisdiction; yet, it renders the sentence inconsistent and uncertain. The inconsistency and uncertainty may be made a pretense for keeping the appellant in servitude a longer period than that to which the law subjects him. The judgment rendered, or sentence passed by a court, though pronounced by a judge, is the judgment or sentence of the law. “It is the certain and final conclusion of the law, following upon ascertained premises.” When the one is rendered, or the other passed, and the term closes, it is not open to reconsideration. The power of the court is exhausted, and there can be no alteration or modification of the judgment or the sentence of the law, as it stands recorded. Uncertainty, inconsistency in the record, renders the judgment or sentence erroneous.

The original statute, in express terms, authorized the imposition of hard labor for the payment of *costs and officers' fees*. The amended statute omits the word *officers' fees*, and employs only the word *costs*. We are not prepared to say, this change of phraseology indicates a change of legislative intention, and either lessens or enlarges the liability for which the court may impose hard labor. *Costs* and *fees* are altogether different in their nature generally. The one is an allowance to a party for expenses incurred in the successful prosecution or defense of a suit; the other, a compensation to an officer for services rendered in the progress of a cause.—*Tillman v. Wood*, 58 Ala. 578; *Musser v. Good*, 11 Serg. and Rawle, 247. Originally, by the common law, fees were demandable by the officers at the instant the services were rendered; and having been paid, became costs, if so provided by statute, recover-

[Bradley v. The State.]

able on the termination of the suit, if the party paying them was successful. In reference to criminal prosecutions especially, the statute does not observe the distinction between costs and fees. All the costs which are taxable (except the compensation of witnesses), consist of the fees fixed by statute for services rendered by the officers of court. It is to these fees the amended statute has reference, and embraces in the general term *costs*. In the amendment, or revision, or in the re-enactment of statutes, changes of phraseology, the omission of words deemed superfluous, or the addition of words rendering the intention more clear, are not infrequent. The construction or operation of the statute is not varied because of such changes. Before the courts can pronounce that the law is changed, the legislative intention to change it must be evident; language must be employed, which is not susceptible of any other just construction. Under our constitutional provision, every amendatory statute is, in its nature, a revision of the statute amended, taking the place of the latter. It is a settled rule of statutory construction, that mere changes of phraseology, mere omission of words which may well have been deemed redundant, do not indicate a legislative intent to change the pre-existing law. *Croswell v. Crane*, 7 Barb. 191; *Hughes v. Farrar*, 45 Me. 72; *Moors v. Bunker*, 29 N. H. 420. The amended statute, in express terms, changes the original statute, so that in cases of misdemeanor the term of hard labor for the payment of costs shall not exceed eight months in any event, and the compensation for the labor shall not be less than thirty cents *per diem*. Under the former statute, the term of labor could be continued, and must have been continued, until the costs were paid, and the compensation for the labor could not exceed forty cents *per diem*, and might be as much less as the court of county commissioners should fix. The changes expressly wrought by the amended statute are in the term of labor and its compensation. The liability for which it may be imposed is described and defined by the word *costs* only. This word, when employed in reference to criminal prosecutions under our statutes, embraces *officers' fees*, the compensation given by law to the officers of court for services they are compelled to render. Of itself it embraces all that was embraced by the words *officers' fees*, with which it was associated in the original statute, and the omission of these latter words from the amended statute, was from no purpose to lessen or change the character of the liability which a convict of crime can be compelled to discharge by hard labor.

Compulsory process for obtaining witnesses in his favor, the bill of rights guarantees to every person charged with a criminal offense. The witness attending in obedience to the process

[Bradley v. The State.]

becomes entitled to compensation from the defendant, the amount of which the statute prescribes. Upon proving his attendance the witness is entitled to a certificate from the clerk of the court, which becomes presumptive evidence of the amount due him. If the defendant is convicted, the compensation claimed by his witnesses, and certified by the clerk, becomes part of the costs in which he is amerced by the general judgment for costs. It is taxed as costs and collected by the sheriff for the use of the witnesses. This does not, however, change the nature or character of the compensation. It is simply a debt—a due to the witness from the defendant for services performed at his instance. Of the debt the certificate of the clerk is evidence, upon which an action at law will lie immediately, though the cause is pending and undetermined. *Hill v. White*, 1 Ala. 576; *Corrville v. Reynolds*, 9 Ala. 969. For such debt, though it is taxable as costs, the statute can not be construed as subjecting the defendant to hard labor. It is only the costs incurred by the State, or to which the State, if it were liable for costs, could be subjected, for the payment of which a convict may be compelled to labor. These do not include costs incurred by the defendant in making defense, whether the compensation of witnesses, or the fees of officers of court for services rendered to him.

The compensation of the sheriff for feeding the appellant while confined in jail to answer the indictment, is part of the costs in the strictest sense of the term, taxable against him on conviction, and which the State is bound to pay, if he be insolvent and unable to pay it. This compensation is part of the expenses to which the State is subjected in the prosecution of offenders against the criminal law, and it is but even-handed justice, that upon conviction, if the State has paid it, there should be reimbursement, or if it has not been paid, there should be indemnity against liability for its payment. In express terms the statute declares that on conviction it is to be paid by the defendant.—Code of 1876, § 5043. For it now the State becomes liable only after a return of execution against the defendant *no property found*.—Pamph. Acts, 1880–81, § 7, p. 11. There is a want of provision in the statute, securing reimbursement to the State from the compensation the county may receive for the hard labor of a convict, the expenses of whose feeding while in prison has been paid by the State. The absence of such legislation is a fact not without significance in determining whether this compensation forms part of the costs, for which a convict may be compelled to hard labor. But when the statute in clear and unambiguous terms fixes the liability on the convict for the compensation, requires it to be taxed, and judgment to be rendered against him for it, as costs,



[Dugger v. Collins &amp; McRea.]

the omission can not justify a construction which would exclude it from the liability he is to satisfy by labor.

Excluding the compensation of the witnesses of the appellant, there remains of costs for which the appellant could be sentenced to hard labor for the county the sum of one hundred and fourteen 60-100 dollars. Eight months of hard labor at forty cents per day would not yield sufficient in money to pay the costs, and for that period, in addition to the period of thirty days, to which he was sentenced as punishment for the offense, the Circuit Court could properly have sentenced the appellant. This court, in the exercise of the power with which it is clothed by statute, will correct the errors in the sentence, which have been pointed out ; and, as corrected, the judgment and sentence will be affirmed, without costs.

## Dugger v. Collins & McRae.

*Bill in Equity for Settlement of Administration, and Appointment of Receiver, and Petition by Purchaser at Sheriff's Sale to be substituted to Share of Devisee.*

1. *Mortgage ; when execution of neither attested nor acknowledged.* Where a mortgage was signed by the husband, and beneath his signature thereto the wife on the same day added : " I hereby join in the execution of the foregoing conveyance, in token that I relinquish all claim of dower in said premises," affixing her signature and seal ; to which a justice of the peace added a certificate in these words : " Sworn to and subscribed before me this day," bearing date seventeen days after the mortgage,—*held*, that the mortgage was neither attested nor acknowledged, and that it was, therefore, inoperative for any purpose.

2. *Same ; execution of.*—The face of such paper clearly indicates that the certificate of the justice of the peace refers to the signature of the wife, which last precedes it, and not to that of the husband.

3. *Same ; when not self-proving, admission by mortgagor of its execution no evidence against stranger.*—A mortgage of land, to be self-proving under the statute, must be properly acknowledged and certified, and recorded in the county in which the land is situate, within twelve months after its execution ; and when not acknowledged, an admission of its due execution by the mortgagor, while sufficient as against him, is no evidence against a stranger claiming an interest in the land.

4. *Lands in possession of receiver can not be sold under execution.* When real estate is in the custody of a receiver, it is *in gremio legis*, and a sale thereof under execution issued on a judgment at law is illegal and void.

5. *Same.*—A creditor of a devisee, the estate of whose testator was in the possession of a receiver appointed in a suit pending in a court of equity for the settlement and distribution thereof, obtained a judgment prior to the appointment of the receiver, but failed to acquire a lien by placing an execution in the hands of the sheriff until after such appointment.

[Dugger v. Collins &amp; McRea.]

ment; and afterwards he purchased at sheriff's sale made under execution issued on the judgment, but without the leave of the court of equity, the devisee's interest in certain lands belonging to the estate and then in possession of the receiver, receiving the sheriff's deed therefor,—*held*, on the petition of the creditor filed in the administration suit, seeking to be substituted to the rights of the devisee in and to the lands,

(a) That he acquired no title by the sheriff's sale and the deed executed thereunder.

(b) That even if he had acquired title, its acquisition would have been in disregard of the court's possession and custody of the property, and no sanction could be given to such irregular proceedings, by putting him in possession of property, the title to which had been thus acquired.

APPEAL from Hale Chancery Court.

Heard before HON. CHARLES TURNER.

The facts are stated in the opinion.

JAMES E. WEBB, for appellant.

THOS. SEAY, and THOS. R. ROULHAC, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The contest in the present suit arises out of conflicting claims to the interest of H. C. McRae in the real estate of his deceased mother, Mrs. Josephine McRae. She left a will, which was admitted to probate, but under a written agreement entered into between the devisees and certain of the heirs, the estate was finally partitioned and distributed, in some respects different from the provisions of the will. No question is here raised as to the construction of Mrs. McRae's will, the proceedings by which its administration was carried into the Chancery Court, nor as to the correctness of the partition and distribution therein made. As we have said, the present contention is over the share of the lands partitioned to Henry C. McRae. His allotment fell entirely in Marengo county.

Mrs. McRae's last residence and administration were in Hale county. Her will, dated in 1869, was admitted to probate in March, 1870, and an administrator with the will annexed then appointed. In April, 1873, the bill, which is the foundation of the present proceedings, was filed, and in December, 1874, a receiver was appointed, the entire property of the estate, real and personal, placed in his hands, and the administration removed into the Chancery Court, in which all the after proceedings of the administration were had. The conflicting claims to H. C. McRae's part of the land arise as follows:

Charles W. Collins claims under a writing, which he sets up as a mortgage. It assumes to convey to Collins all right, title and interest of H. C. McRae in the estate, real and personal, of

[Dugger v. Collins &amp; McRae.]

Josephine McRae, deceased, to secure the payment of a note of six hundred and twenty dollars, due January 23d, 1873. This paper writing is signed as follows:

“Witness my hand and seal, this 23d day of January, 1872.

H. C. McRAE. [L. s.]

“I, Sophia McRae, wife of the said H. C. McRae, hereby join in the execution of the foregoing conveyance, in token that I relinquish all claim of dower in said premises to said Collins. Witness my hand and seal, this 23d day of January, 1872.

S. J. McRAE. [L. s.]

“Sworn to and subscribed before me, this 9th day of February, 1872.

PETER LYDON,

Justice of the Peace, Hale Co., Ala.”

The foregoing contains all that is shown by the paper, there being neither subscribing witness, nor certificate of acknowledgment. This paper was filed for record in Hale Probate Court on the 14th February, 1872, and was soon afterwards recorded. It was filed for record and recorded in Marengo Probate Court November 23d, 1877. On the 2d day of April, 1877, the said Collins filed his petition in said administration cause, setting up his said alleged mortgage, and, without asking to be made a party to the suit, prayed that the said mortgage be foreclosed, and the said interest of the said H. C. McRae be applied to the payment of his said claim. He made no one party defendant to his petition, prayed no process, and none was issued or served. The prayer was, that the court “make all such necessary orders and decrees in the settlement and distribution of the said estate of Josephine McRae, deceased, as shall secure to petitioner the enforcement of his claim against the share of the said Henry C. McRae, and that the amount to which he is entitled, or so much thereof as may be necessary to pay said note may be decreed to petitioner, and paid to him on the settlement of said estate.”

W. W. Dugger's claim is as follows: On the 28th of March, 1874, he recovered a judgment in Hale Circuit Court against Henry C. McRae for the sum of \$170.40 and costs of suit; and soon afterwards an execution was issued on said judgment, placed in the hands of the sheriff of Hale county, and by him returned no property found. On the 9th day of October, 1877, an *alias* execution was issued on said judgment, which was placed in the hands of the sheriff of Marengo county, 15th November, 1877, and was on that day levied on H. C. McRae's interest in that part of the lands of Josephine McRae, deceased, which lie in Marengo county. Having advertised the same, the sheriff of Marengo county sold said interest on the 7th day of January, 1878, and W. W. Dugger became the purchaser, and received the sheriff's deed therefor, dated April 1st, 1878. An execu-



[Duggér v. Collins &amp; McRae.]

tion was also issued on said judgment, on the 13th November, 1877, was received by the sheriff of Hale county, and on the same day was levied on the lands of Josephine McRae's estate which lie in Hale county, as the property of Henry C. McRae. This property was sold by the sheriff of Hale, January 14th, 1878, was purchased by W. W. Dugger, and sheriff's deed made to him on the same day. On the 11th day of November, 1878, said W. W. Dugger filed his petition in said administration cause, in which he set up his claim to Henry C. McRae's interest in said estate, under the two sheriff-sales, his purchases thereunder, and the sheriffs' conveyances to him. He made said H. C. McRae a party, prayed process against him, and prayed to be "made a party to said cause, to have his rights in said property adjudicated and protected." He prayed also that the court would, "by appropriate decree, order and direct that petitioner be substituted to all the rights of the said H. C. McRae in and to said lands, and that the proceeds of his interest therein be paid to your petitioner."

On the 2d day of December, 1879, Henry C. McRae, through counsel, put in a joint answer to the two petitions by Collins and Dugger, in which he admitted "that he and his wife executed the said mortgage to C. W. Collins in the presence of Peter Lydon, J. P., who then and there subscribed his name as shown by said mortgage, and that [the] mortgage debt remains due and unpaid." He claimed that Dugger's purchases at sheriffs' sales were inoperative and void, because the property was then in the hands of the receiver appointed by the Chancery Court.

Said administration cause came before the chancellor for final hearing and for distribution, and he rendered his decree, October 30th, 1879. Among other matters, he decreed and ordered that the register of the court make partition of the lands among those entitled under the will of Mrs. Josephine McRae and the written agreement of the parties, he, the chancellor, determining and decreeing the number of shares into which the lands should be divided, and the persons who should take those shares, as first takers. To H. C. McRae was allotted one share, but this was to remain subject to the rights and claims of his creditors, to be settled and determined by future decree. The register made his report of partition, which was confirmed by the court, December 2d, 1879. By that report and confirmation, there was allotted to H. C. McRae the west half of the west half of section 24, township 18, range 3 east—about 160 acres—lying in Marengo county.

The controversy over the conflicting claims of Collins and Dugger to the share allotted to H. C. McRae, was then submitted to the chancellor on their several petitions. For Collins,

[Dugger v. Collins &amp; McRae.]

the submission was made on the papers mentioned and described above, supplemented alone by the written admission of counsel for H. C. McRae, "that the instrument of which Exhibit B [the mortgage] to Collins' petition is a copy, was executed by the said H. C. McRae and his wife, S. J. McRae, on the day the same bears date, for the purposes therein stated, in the presence of one Peter Lydon, who attested the same as a subscribing witness, and the amount of said note remains due and unpaid, with the interest thereon." Dugger submitted with his petition the records and documentary proofs, stated above in giving a description of his claim. The chancellor decreed that Collins was entitled to a first lien, to be paid out of said lands, and Dugger to a second lien on the lands, for the collection of his judgment. He set aside Dugger's purchases at sheriffs' sales, on the ground that the lands were then in the possession and control of a receiver appointed by his court. That decree is here assigned as error.

There are several grounds on which the decree of the chancellor must be reversed. The paper called a mortgage is without a subscribing witness, and without any certificate of acknowledgment. The certificate of Lydon, the justice, is in no sense a certificate of acknowledgment. In its present form, and in the present state of the proof, that paper must be treated as if that certificate were not upon it. Aside from its fatal defects of substance, it bears date seventeen days after the date of the signatures to the paper; a strong circumstance to show that his certificate furnishes no evidence that the paper was signed in his presence. Being without subscribing witnesses, and without a certificate of acknowledgment, such as the law can recognize, the paper is void as an instrument conveying any interest in real estate.—*Wilson v. Glenn*, 62 Ala. 28; *Harrison v. Simons*, 55 Ala. 510; *Lord v. Folmar*, 57 Ala. 615.

Again. To the present controversy Dugger is a material, and very important party. The paper called a mortgage is not self-proving. To be so, it must have been properly acknowledged and certified, and recorded in Marengo county within twelve months after its execution. Neither of these essentials was observed in this case.—*Harrison v. Simons*, 55 Ala. 510; *Sharpe v. Orme*, 61 Ala. 263. Now, while the admission made by H. C. McRae of the due execution and attestation of the instrument may have been sufficient as against him, it was no evidence whatever against Dugger; and the chancellor, therefore, had no evidence whatever, as against him, Dugger, that the paper was executed.

A further view. The certificate of the justice, "sworn to and subscribed before me this 9th day of Feb'y, 1872, Peter Lydon, Justice of the Peace, Hale Co., Ala." is appended to the

[Dugger v. Collins &amp; McRea.]

paper and signature of Mrs. Sophia McRae, and contains no reference to the signature of H. C. McRae. The face of the paper indicates clearly that this certificate refers to the last antecedent conveyance.—*Doe ex dem. v. Wilkinson*, 21 Ala. 296; *McBryde v. Wilkinson*, 29 Ala. 662; *Doe ex dem. v. Wilkinson*, 35 Ala. 453. The claim of Collins is utterly unsupported, and the chancellor erred in decreeing its allowance.

The appellant, Dugger, makes out a clear right to the land, if his purchase at sheriff's sale is not, under the circumstances, void. The specific objection to the validity of that sale is, that the land was then in the hands of a receiver appointed by the Chancery Court—was constructively in the custody of the court—and that no action could be taken, or suit brought, affecting the right or title to the property, without first obtaining the permission of the court therefor; and such permission was not obtained. The foundation of the original bill in this cause is the alleged want of diligence and activity of the administrator with the will annexed, in the conduct of the administration, growing out of his failing health, and failure to carry out the intention of the testatrix, as expressed in the will. The result of the suit was the appointment of a receiver, and a transfer to him of all the property, effects, powers and functions of the administration. He became *quasi* administrator, and administered the estate under the control and direction of the Chancery Court. The will made such disposition of the property, as that, until the final decree, it could not be known with any proximate certainty, to what extent the property, real and personal, would be consumed in the payment of debts, pecuniary legacies, and the charges the will fastened on the estate. If any thing should be left for partition or distribution, its value could not be known, nor could any safe estimate be made of the value of the respective shares that would be allotted to the several claimants. This value might be unequal by reason of partial distribution, if for no other cause. If the land, or a part of it was saved for division, it could not be affirmed it was susceptible of equitable partition, without a sale and conversion of it into money. Nor, if partition should be ordered and made, could it be known whether H. C. McRae's share would fall in Hale or Marengo county. Now, the possession and control of the entire estate, real and personal, were placed in the hands of the receiver, or rather, taken charge of by the Chancery Court, to be preserved and administered, until time should solve these problems, and point out the proper disposition to be made of the assets. In the incertitude which then enveloped the estate, it requires no argument to show that any purchase of H. C. McRae's interest would be the merest conceivable speculation. If the sale and purchase were made as of real estate, the estate



[Dugger v. Collins &amp; McRae.]

might all become money, as a necessary means of division. If of personal estate, the residuum might consist entirely of lands for partition. If the lands were levied on and sold in Hale, the share allotted to H. C. McRae might fall in Marengo, and *e converso*. So, the necessary result of allowing and sanctioning such sale would be a probable sacrifice of the interest sold. It would tend to another injurious result. A purchase so made would probably generate and intensify an interest and desire in the purchaser, to so shape the after administration of the trust, and the partition and distribution of the estate, as most to augment the value of the interest purchased, and in the form in which he had purchased it. And it might engender a like interest and desire in some adversary claimant to the opposite result, for the opposite purpose. All these probable, opposing influences would be detrimental to that faithful impartiality a receiver should always observe. These considerations, we hold, should exert their influence, aside from the principle presently to be considered.

The possession of the receiver is the possession of the court. "When such a receiver is in possession under the process or authority of the court, in execution of a decree, or decretal order, his possession is not to be disturbed, even by an ejectment under an adverse title, without the leave of the court. For his possession is deemed the possession of the court; and the court will not permit itself to be made a suitor in a court of law." 2 Story's Eq. Jur. § 833 *a*. "So extremely jealous are courts of equity of any interference, *pendente lite*, with the possession of their receivers, that they will not ordinarily permit property which is the subject of the receivership to be sold on execution. And when a sheriff has levied upon property in the hands of a receiver, equity will not interpose by an injunction in behalf of the sheriff, to restrain an action at law against him for such interference. The proper remedy for a judgment creditor, who desires to question the receiver's right to the property, is to apply to the court appointing him, to have the property released from the receiver's custody, in order that he may proceed against it under his judgment. Since to permit the property, while in custody of the receiver, to be levied upon and sold under the process of another court, would at once give rise to a conflict of jurisdiction, and would seriously interfere with and impair the receiver's right to the management of the property under his appointment."—High on Receivers, § 141. See also 5 Wait's Actions and Def. 354; *Angel v. Smith*, 9 Ves. 335; *Fessenden v. Woods*, 3 Bosw. 550; Rorer on Jud. Sales, § 709; *Parker v. Browning*, 8 Paige, 388; *Field v. Jones*, 11 Ga. 413; *Wiswall v. Sampson*, 14 How. U. S. 52, 65.

It is urged for appellant that it is only the *possession* of the

[Dugger v. Collins &amp; McRae.]

property in the hands of the receiver, which may not be disturbed, and that the rule does not inhibit a mere levy and sale of lands which in no sense interfere with the receiver's possession. *Albany City Bank v. Schermerhorn*, 9 Paige, 372 is cited in support of this view. In that case the creditor, who caused the land to be levied on, had obtained his judgment and thereby fastened a lien on the land, before the bill was filed under which the receiver was appointed. High on Receivers, § 171, referring to this case, says: "When a receiver is in the actual possession of the defendant's real estate, which is subject to the lien of a judgment against the defendant, the levy upon, and sale of the defendant's interest in the real estate by a sheriff, does not disturb the receiver's possession, and is not a contempt of court." *Ib.* § 141. The case referred to fully sustains what Mr. High gives as the principle of it. Against the right, however, to levy on and sell lands in the hands of a receiver, are *Wiswall v. Sampson*, 14 How. U. S. 52; *Robinson v. Railway Co.*, 66 Penn. St. 160; Freeman on Executions, § 129. In *Wiswall v. Sampson*, the ruling was, that when real estate is in the custody of a receiver appointed by a court of chancery, a sale of the property under execution issued by virtue of a judgment at law, is illegal and void. So, in *Robinson v. Railway Co.*, the court, speaking of real estate in the hands of a receiver said: "It was then in *gremio legis*, in legal custody, and to permit it to be levied on and sold under the process of the court of common pleas, would at once raise a conflict of jurisdiction, and interfere with the right of the receiver of the Supreme Court to manage the property under his appointment." In Freeman on Executions, § 129, it is said: "When a court of equity has acted by taking property into its possession by the appointment of a receiver, such property, whether real or personal, is clearly in *custodia legis*." See also *Martin v. Davis*, 21 Iowa, 535; *Bentley v. Shrieve*, 4 Md. Ch. Dec. 412. In the present case, although Dugger obtained his judgment before the receiver was appointed and the property placed in his hands, he did not acquire a lien by placing execution in the hands of the sheriff of Marengo county until long afterwards. We concur in the opinion announced in *Wiswall v. Sampson*, *supra*, and hold that the levy and sale under Dugger's execution conveyed no title. If we doubted on this subject, there is another principle on which no relief should be granted on Dugger's petition. His title was acquired in disregard of the possession and custody of the lands, which the Chancery Court had acquired, and without obtaining or asking the leave of the court to institute such proceedings. The court of chancery will not sanction such irregular proceedings, by putting a party in pos-

[Alexander v. Wheeler.]

session of property, the title, or seeming title, to which he has thus acquired.

The result of what we have said is, that neither Collins nor Dugger has shown a right to relief under their several petitions.

Reversed and remanded.

## Alexander v. Wheeler.

### *Statutory Real Action in the nature of Ejectment.*

1. *Bill of exceptions ; when recital shows that all the evidence is set out.* A recital in a bill of exceptions, that "the foregoing evidence being before the jury," the court gave certain charges therein set out, shows with sufficient certainty, that the evidence recited in the bill was, in substance, all that was introduced on the trial.

2. *Ejectment ; plea of not guilty, a waiver of a disclaimer.*—In ejectment a plea of not guilty, being an admission of possession by the defendant, is, under our practice, a waiver of a disclaimer also filed by the defendant touching the same land.

3. *Same ; plea of statute of limitations also a waiver of a disclaimer.* For similar reasons, it is not permissible to set up by special plea, the statute of limitations under an adverse possession, and accompany it with a disclaimer, unless they are made applicable to entirely different parts of the premises sued for. In such case the disclaimer is also waived.

4. *Adverse possession ; what does not constitute.*—The mere possession of land will not constitute adverse possession, as the law presumes, in the absence of proof to the contrary, that every one in possession of land holds under the true or real owner.

5. *Same ; burden of proof.*—Adverse possession is a fact which must be proved, and the burden of proof is always cast upon him who interposes, and relies on it as a defense.

6. *Same ; what is.*—But an actual occupancy and substantial enclosure of land by a defendant, or by those under whom he derives title, or possession, accompanied by acts of ownership inconsistent with the ownership of another, is presumptively adverse possession, but is liable to be rebutted by proof to the contrary.

7. *Same ; when demand for possession, or notice to quit dispensed with.* Where one in possession of land, either as tenant, or under an executory contract of purchase, repudiates his contract by an assertion of hostile possession, this is such a wrongful act as determines his prior relationship, and dispenses with a demand for the possession by the plaintiff, or a notice from him to the tenant to quit.

8. *Same ; when it exists.*—If two proprietors of adjoining lands agree upon a dividing line between them, and erect a fence thereon, each occupying up to the fence, their possession is presumed to be adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, it will ripen into a perfect title.

9. *Same.*—In such case, however, the intention with which possession is taken and held, must always constitute an essential consideration ; and hence, if a partition fence be extended by any one of two adjacent owners, so as to embrace within his enclosure a portion of his neighbor's



[Alexander v. Wheeler.]

land through mere inadvertence, or ignorance of the location of the real line, or for purposes of convenience, and with no intention to claim the part of his neighbor's land so enclosed, but intending merely to claim adversely only to the real or true boundary line, wherever it might be, such possession is not adverse to the owner.

10. *Same.*—But the rule is different, where the fence is believed to be the true line, and the claim of ownership is up to the fence as located, although the established boundary line is erroneous, and the claim of title is the result of the mistake. In such case there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of mistake.

11. *Ejectment; design of the statute of limitations.*—One of the chief designs of the statute of limitations is to compose controversies growing out of mistakes and errors of description, which tend so greatly to the disturbance of land titles; and knowledge by one in possession claiming title, that his title is defective, does not generally prevent such possession from being adverse, the test being the actual claim, and not the *bona fides* of it.

12. *Adverse possession; when possession at first permissive, what necessary to constitute.*—Where the entry upon land is merely permissive, being allowed under a mere license from the true owner as matter of favor, possession under it can become adverse only by clear, positive, open and continuous assertion of title, hostile to the true owner, and actually or constructively brought to his knowledge.

13. *Same.*—Hence, if there be parol exchange of lands for purposes of mutual tenancy, the presumption is that the possession is not adverse, but permissive; but even in such case, if the proof show a hostile claim of title by either of the occupants, possession for ten years under such claim may mature into a good title.

14. *Proposition of compromise of pending suit inadmissible.*—The testimony of a witness to the effect, that after the commencement of a suit in ejectment the plaintiff and defendant mutually agreed that he might survey a disputed boundary line, and that each party would abide by the result of such survey, and pay half the costs, tending merely to show, as it does, a proposition of compromise, is inadmissible.

15. *Pleadings to be construed by the court, not by the jury; reference to them by the jury.*—The court should construe the pleadings in a cause, as matter of law, and not submit their construction to the jury; but pleadings being explained by the court, neither party can be prejudiced by any reference to them by the jury during their deliberations, for the purpose of refreshing their memory as to any fact to which they were pertinent.

16. *Ejectment; right of recovery not affected by parol agreement.*—In ejectment it is not necessary for the plaintiff to offer to rescind a parol exchange of lands made between those under whom he and the defendant respectively hold, as a condition precedent to the commencement of his suit. In such case, the plaintiff having the legal title to the land sued for, and his claim thereto not being barred, he is entitled to recover, notwithstanding such parol agreement.

17. *Judgments and verdicts; what essential to their validity.*—Every judgment of a court of law must either be perfect in itself, or capable of being made perfect by reference to the pleadings, or to the papers on file in the cause, or else to other pertinent entries on the court docket; and, in like manner, verdicts of juries can not be supplemented by intendment, or by reference to mere extrinsic facts.

18. *Verdict of jury; when void for uncertainty.*—While a general verdict in favor of the plaintiff in an action of ejectment, for the lands described in the complaint, is sufficient; yet, when the verdict is for a part only of such lands, or the finding has no reference to the description given in the pleadings, the boundaries of land recovered must be

[Alexander v. Wheeler.]

designated with reasonable certainty, so as to enable the court to pronounce judgment thereon. Otherwise it is void for uncertainty, and can not be sustained.

19. *Same*.—A verdict in favor of the plaintiff for “the land running to Fergusson and Allen line,” there being nothing in the pleadings to aid the description, is void for uncertainty, and can nor support a judgment of recovery.

APPEAL from Cleburne Circuit Court.

Tried before Hon. WM. L. WHITLOCK.

This was a statutory real action in the nature of ejectment, brought by Calvin M. Wheeler against George W. and Anna Alexander, and was commenced on the 19th February, 1878. The land described in the complaint is the west half of the north-east quarter of section 10, township 13, range 11. The pleadings are sufficiently stated in the opinion. On the trial, as shown by the bill of exceptions, “the plaintiff introduced a patent from the United States to Arthur Alexander, and deed from said Alexander to plaintiff to the land sued for, and introduced evidence tending to show that defendants were in possession, at the commencement of this suit, of the following portion of said land, to-wit: A strip about four rods wide along the entire western boundary line, and of a nook in the north-east corner of the land sued for, and a small strip on the north and south ends consisting of about one-fourth of an acre each; and his damages and rents.

“One of the controverted points was as to where the true western boundary line of the land sued for was. The defendants introduced testimony tending to show that Mathew Alexander, the late husband of the defendant, Annie, and father of the defendant, George W. Alexander, owned and was in possession of the 80 acre tract lying immediately west of the land sued for, in the year 1844; that in said year, he had said tract surveyed and platted by John Lindsey, the then county surveyor, and in said survey he ran and marked out the line running north and south to the north boundary line of the section between the land sued for and the 80 acre tract above named; that soon thereafter a fence was put on said line from the centre of said section, as established by the survey, running north nearly a quarter of a mile; and that it was then agreed between said Mathew Alexander and Arthur Alexander, who was the father of the said Mathew, and who was then the owner, and in possession of the land sued for, and who is the immediate vendor of the plaintiff, that the said fence should be the dividing line between them. The defendant also introduced proof tending to show, that they and the said Mathew Alexander, under whom they claimed, had been in possession of the land, and claiming up to said fence adversely from the time it was

[Alexander v. Wheeler.]

placed there as aforesaid until the present time. The plaintiff introduced testimony tending to show that said possession was not adverse, and that the true western boundary of the land sued for, was not where said fence was, but some four rods west of it. The foregoing evidence being before the jury, the plaintiff introduced W. P. Harwell, and proposed to prove by him that, after the commencement of this suit, the plaintiff and defendants agreed that the said Harwell might survey the lines in controversy, and that each party would abide by the survey, and pay half the expenses thereof, that each party paid half the expenses, and that the agreement was verbal." To this evidence the defendants objected, but their objection was overruled, and the plaintiffs were allowed to make the offered proof, and they excepted.

"The defendant, George W. Alexander, testified, that by an agreement with the plaintiff, the fence on the north end of the line running north and south between plaintiff and defendant, a quarter of a mile in length, between said tracts, had been moved the width of a fence row on the plaintiff's side, for the purpose of cultivating the fence row, the fence at that point being a dividing fence between plaintiff and defendants; and that plaintiff, in compensation therefor, was to move the fence on the south end of the tract sued for a like distance, for the like purpose, on defendants' land, that also being a dividing line between them, defendants owning the land south; and the fence, as it now stands, on the north end of said line, was the width of said fence row on the plaintiff's side of the line, and from the old fence inside of defendant's field; that by agreement with the plaintiff, the latter was to keep in repair the south half of said fence, and defendants were to keep in repair the north half of said fence; and that he moved said fence the width of said fence row for the purpose of repairing it. This fence row was all the land belonging to the plaintiff, that defendants admitted they were in possession of (and only in the manner above stated), except as may be shown by the pleadings. The defendants also introduced evidence tending to show, that a fence was put upon said line so surveyed by Lindsey in 1844, immediately after said survey, on the south end of it, for a quarter of a mile or more, and on the north end, where the old fence was first put, except as moved for the fence row as above stated, and that the fence intermediate connecting the two, is on a direct line, and has been built there for more than ten years before the commencement of this suit. There was also proof by the defendants tending to show, that these defendants and those under whom they claim, have claimed up to the fence on the south end aforesaid, as the true line, and



[Alexander v. Wheeler.]

holding the same adversely for more than ten years before the commencement of this suit, or demand of possession.

"The plaintiff introduced evidence tending to show, that there was no agreement between the plaintiff's vendor and defendants' ancestor as to the true line between them on the south end of said line, or anywhere else on said line; that the line run by Lindsey between the western boundary of the tract sued for and the defendants' land, was incorrect, and that the true line was some four rods all along the line further west; and that the plaintiff and his vendor had been in possession of, and claiming as their own, all the lands on the east side of the said fence, on the south end of said line, for more than ten years before the commencement of this suit.

"The defendants also introduced evidence tending to show that the plaintiff, in 1865, or 1866, made a verbal exchange of certain small pieces of land with Mathew Alexander, defendants' ancestor, and each then took possession of that received from the other; that by and under said exchange said Mathew took possession of a small nook or piece consisting of one acre, more or less, in the northeast corner of the tract sued for; that plaintiff then went into possession of the lands then received from said Alexander, and cleared and fenced one of the pieces, and has been in possession of the same until since the commencement of this suit; that said Alexander enclosed and cultivated said acre, and he and these defendants have been in possession of the same, claiming it under said exchange, from that time to the present. There was no proof tending to show, that any demand had been made on the defendant, Mrs. Annie Alexander, for the possession of said one acre before the commencement of this suit," although there was proof tending to show that the plaintiff, before suit brought, had demanded of G. W. Alexander the entire 80 acre tract, in which the one acre was situate. The defendants also showed that they claimed under the will of the said Mathew Alexander.

"The foregoing evidence being before the jury the plaintiff requested the court to give in writing the following charges," to-wit: 1. "That a possession, to be adverse, must be knowingly and designedly taken and held, and a possession through accident, or ignorance of the dividing line between adjoining proprietors, is not sufficient to constitute adverse possession." 2. That if the jury "believe from the evidence, that the defendants made an agreement with the plaintiff to have the lines of the land ascertained by a survey, the jury may look to such agreement, in connection with all the other evidence in the case, in determining whether the possession of the defendants has been adverse or not." 3. "That if the jury believe the evidence, the plaintiff is entitled to recover that part of the

[Alexander v. Wheeler.]

land sued for, that is in the possession of the defendants, and to which the defendants set up no claim." 5. "That a possession of land by the permission of the owner is not adverse, and a possession under a mere exchange of land for convenience, is not adverse to the owner." 6. "That if the jury believe from the evidence, that the defendants, at the time of the commencement of this suit, were in possession of any of the lands sued for, the possession of which is denied in the plea of the defendants, the plaintiff is entitled to recover such land." 6. "The burden of proof is on the defendants to show any agreement as to the line alleged by them to have been made by Arthur Alexander and Mathew Alexander." 7. "That it is the duty of the jury to read the pleas filed by the defendants to determine what lands the defendants deny being in possession of." 8. "The law never presumes adverse possession, neither can the jury presume it; but the burden is upon the defendants to show it by the evidence in the case." 9. "The law presumes that every one in possession of land holds possession under the true owner." 10. "The mere possession of land will not constitute adverse possession."

To the giving of each of these charges the defendants excepted; and they then asked the court to give to the jury the following charges, each of which the court refused to give, and they excepted, to-wit: 1. "If the jury believe from the evidence that Lindsey surveyed one of the lines in controversy in 1844, and the fence was put on said line, and they believe that the present fence is on the same row, and that these defendants and those under whom they claim, have been claiming up to said fence line and holding the same adversely for more than ten years before the commencement of this suit, then the plaintiff can not recover any lands so occupied and claimed, notwithstanding the parties may never have agreed on it as the true line." 2. "If the jury believe from the evidence that Lindsey made a survey of the land for Mathew Alexander, and that the fence was put on the line surveyed by Lindsey, and that Mathew Alexander and those claiming under him have been in possession of, and claiming land up to the fence as the true line, for more than ten years before the bringing of this suit, or the demand of possession, then the plaintiff can not recover any land so in possession and claimed." 3. "If one party have land surveyed, and a fence is put upon the line, and each holds and claims adversely up to the line so established for more than ten years before the commencement of this suit, then it is binding on the parties and their vendees, although the surveyor did make a mistake in the survey." 5. "If the jury believe from the evidence that Mathew Alexander and C. M. Wheeler did exchange certain small tracts or parcels of land, indefinitely, to

[Alexander v. Wheeler.]

be used and cultivated by each other, the plaintiff must offer to rescind said contract, or abandon said pieces so received of Alexander before the commencement of this suit, in order to entitle him to recover the lands so exchanged by him to Alexander."

The jury returned a verdict for the plaintiff as shown in the opinion, on which judgment was rendered in his favor for the recovery of all the land described in the complaint. The defendants then moved to set aside the verdict and to arrest the judgment of the court, on the ground that the verdict was void for uncertainty; but the court overruled their motion, and they excepted.

The rulings of the Circuit Court above noted are here assigned as error.

AIKEN & BURTON and J. B. MARTIN, for appellant.

S. P. BARBER, SMITH & SMITH, and ELLIS & MARTIN, *contra*.

SOMERVILLE, J.—The recital in the bill of exceptions in this case, that "the foregoing evidence being before the jury," the court gave certain charges which appear in the record, shows with sufficient certainty that the evidence recited is in substance all that was introduced. It was so held in *Walker v. Carroll*, 65 Ala. 61, overruling previous decisions which held the contrary.

The present action is one under the statute, in the nature of ejectment. The chief contention was as to the true western *boundary line* of the land for which suit was brought, the plaintiff contending that a certain strip in dispute, but a few feet wide, was a part of the west half of the northeast quarter of a section described in his complaint, and the defendants that it was included in the east half of the northwest quarter of the same section. The pleadings raise a further contention as to small parcel of about *one acre* in the northeast corner of the tract sued for by the plaintiff.

Some confusion is apparent in the whole conduct of the case in the court below, by reason of the conflicting character of the pleas interposed by the defendants. In the first place, there is an admission of possession to the extent of the *one acre* parcel, and a plea of "not guilty" as to the alleged unlawful withholding of it. Next follows a *disclaimer*, denying possession of any other part of the lands for which suit is brought. Then follow two pleas setting up the statute of limitations, alleging *adverse possession*, under claim of title, respectively, for ten and twenty years, the benefit of which could have been obtained under the "general issue," if pleaded to the whole action.



[Alexander v. Wheeler.]

A plea of not guilty would be an admission of possession by the defendants, being equivalent to the consent rule at common law, and is, therefore, clearly repugnant to, and inconsistent with a plea of disclaimer. The interposition of the plea of not guilty would, under our practice, as held by this court, be a waiver of the plea of disclaimer. It would be an effort to admit and deny possession both in the same breath, which is not permissible under the consent rule, as established in the 24th Rule of Practice in the Circuit Courts.—*Bernstein v. Humes*, 60 Ala. 582; Code of 1876, §§ 2962–3.

In like manner, and for similar reasons, it is not permissible to set up, by special plea, the statute of limitations under an adverse possession, and accompany it with a plea of disclaimer, unless the two pleas are made applicable to entirely different parts of the premises in controversy. The plea of disclaimer was, under this principle, waived by the defendants, and their admission of adverse possession must be construed to relate to the entire premises claimed by the plaintiff.

Many of the charges, given by the court below, involve mere fundamental principles of the most familiar character. Among them are, that the mere possession of land will not constitute adverse possession, and that the law presumes that every one in possession, in the absence of proof to the contrary, holds possession of land under the true or real owner.

It is equally well established, that adverse possession is a fact which must be proved, and the burden is always cast upon him who interposes and relies upon it as a defense. But an actual occupancy and substantial enclosure of land by a defendant, or by those under whom he derives title or possession, accompanied by acts of ownership inconsistent with the fact of ownership in another, is presumptively adverse possession, liable to be rebutted by countervailing proof to the contrary.—*Jackson v. Woodruff*, (1 Cow. 276), 13 Amer. Dec. 525.

This case, under the pleadings, was not one in which previous demand of possession was requisite in order to maintain the action. Where one in possession of land, either as tenant or under an executory contract of purchase, repudiates his contract by an assertion of hostile possession, it is such a wrongful act as determines his prior relationship, and dispenses with demand of possession by the plaintiff, or notice from him to the tenant to quit. The law does not exact a useless procedure. *Right v. Beard*, 13 East. 210; *Doe v. Jackson*, 1 Barn. & Cres. 448; *Prentice v. Wilson*, 14 Ill. 91.

The matter of main controversy, in this case, relates to the principles of law bearing on the real and the assumed boundary line between the rival contestants for the ownership of the intermediate disputed tract.

[Alexander v. Wheeler.]

We take it to be settled, in this regard, that if two proprietors of adjoining lands *agree* upon a dividing line between them, and erect a partition fence upon such assumed boundary line, each occupying up to the fence, their possession is mutually presumed to be adverse to each other, and if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title.—*Brown v. Cockerell*, 33 Ala. 38; *Rider v. Maul*, 46 Penn. St. 376; *Burrell v. Burrell*, 11 Mass. 294; 3 Wait's Act. and Def. 103.

The *quo animo*, or intention with which possession is taken and held by a defendant, must always constitute an essential consideration. Hence, if a partition fence be extended by one of two adjacent owners, so as to embrace within his enclosure a portion of his neighbor's land, through mere inadvertence, or ignorance of the location of the real line, or for purposes of convenience, and with no intention to claim such extended area, but *intending to claim adversely only to the real or true boundary line*, wherever it might be, such possession would not be adverse or hostile to the true owner. There can be no adverse possession without a coincident intention to claim title.—*Brown v. Cockerell*, 33 Ala. 38. If the claim, in other words, is not up to the partition fence as extended, but only to the true line, there would be no adverse holding of the new enclosure, but only up to the true dividing line.—*Burrell v. Burrell*, 11 Mass. 294.

But the rule is different where the fence is believed to be the true line, and the claim of ownership is up to the fence as located, even though the established division line is *erroneous*, and the claim of title was the result of the mistake. In such case there is a clear intention to claim to the fence *as the true line*, and the possession does not originate in an admitted possibility of mistake. One of the chief designs of the statute of limitations is to compose controversies growing out of mistakes and errors of this description, which tend so greatly to the disturbance of land titles.—*Burdick v. Heivly*, 23 Iowa, 511; *Tyler on Eject.* 138; *Crary v. Goodman*, 22 N. Y. 170; *Hunter v. Chrisman*, 6 B. Monr. 463; *Enfield v. Day*, 7 N. H. 457. Knowledge, however, by one in possession claiming title, that his title is defective, does not generally prevent such possession from being regarded as adverse. The test is the actual claim, and not the *bona fides* of it.—*Riggs v. Fuller*, 54 Ala. 141; *Manly v. Turnipseed*, 37 Ala. 522.

In all cases where the evidence shows that the entry of the defendant upon the premises in dispute is merely *permissive* in its inception, being allowed under a mere license from the true owner as a matter of favor, possession under it can become adverse only by clear, positive, open and continuous

[Alexander v. Wheeler.]

assertion of title, hostile to such owner, and actually or constructively brought to his knowledge.—*Collins v. Johnson*, 57 Ala. 304; *Medford v. Pratt*, 4 Pick. 222; *Kirk v. Smith*, 9 Wheat. 241. Presumptively, therefore, if there be a parol exchange of lands for purposes of mutual tenancy, the possession would not be adverse, but permissive. But even in such cases, if the proof show a hostile claim of title by either of the occupants, possession for ten years under such claim may mature into a good title, under the principles above enumerated. But the statute of limitations will not run, if there be, during such period of time, a recognition of the real owner's title, because the possession then ceases to be adverse. The burden of proving the possession adverse, however, as above stated, is always upon the person alleging it.—*Collins v. Johnson*, 57 Ala. 304.

Under these principles, charges numbered 5, 8, 9, 10, and the second charge numbered 6, were properly given by the court below; and charge numbered 3, requested by the appellants, should have been given as requested.

Charges 1 and 2, requested by appellants, were properly refused, because they ignore the principle that mere adverse possession, unless continuous, open and notorious, will not confer title, or unless being uninterrupted it is otherwise brought home to the knowledge of the true owner.

The testimony of the witness, Howell, was improperly admitted, showing that, after the commencement of the suit, the plaintiff and the defendant agreed that he might survey the disputed boundary line, and that each party would abide by the result of such survey, and pay half the costs. This, we think, in view of the pending litigation, must be taken as a mere proposition of compromise, and can not operate as an admission of right prejudicial to either side. The policy of the law favors amicable adjustments of litigation, and therefore protects negotiations made *bona fide* for their settlement, regarding them in the nature of confidential overtures of pacification. The modern and more honest doctrine, we think, does not require that such propositions should be made expressly as "without prejudice," in order to exclude them from being introduced in evidence as an implied admission of liability.—2 Whart. Ev. § 1090. The admission allowed to go to the jury in *Brown v. Cockerell*, *supra*, was not of this character. Such an agreement, being by parol and relating to lands, would, of course, be offensive to the statute of frauds, as a mere agreement.

The court should have construed the pleadings as matter of law, and should not have submitted their construction to the jury, as the seventh charge given might be interpreted to signify. The pleadings being explained by the court, no one could be prejudiced by any reference being made to them by the jury



[Alexander v. Wheeler.]

during their deliberations, for the purpose of refreshing their memory as to any fact to which these papers were pertinent.

There was no need on the part of the plaintiff of any offer to rescind any *parol* exchange of lands made between those under whom they respectively held, as a condition precedent to the commencement of this suit. If the plaintiff had the legal title to the lands sued for, and the claim on his part was not barred by lapse of time, he would be entitled to recover, in the absence of a valid agreement by which the right of possession had been parted with or relinquished.

The charges, other than those above noticed, are either abstract, as being unsupported by the evidence set out in the bill of exceptions, or are misleading, as being susceptible of easy misinterpretation, or they are unnecessary to be considered in view of the waiver of the plea of disclaimer by the defendants.

But one other matter remains for our consideration. The verdict of the jury is in the following words: "We, the jury, find for the plaintiff *the land running to the Fergusson and Allen line*, and assess his damages at thirty dollars." The judgment follows this verdict in the description of the land. It is urged that both the verdict and the judgment are void for uncertainty. We are of opinion that the point is well taken.

The rule of law is, that every judgment of a court of justice must either be perfect in itself, or capable of being made perfect by reference to the pleadings, or to the papers on file in the cause, or else to other pertinent entries on the court docket. Freeman on Judg. § 54; *Dickerson v. Walker*, 1 Ala. 48; *McClellan v. Cornwell*, 2 Cald. 298.

So verdicts, in like manner, can not be supplemented by intendment, or by reference to mere extrinsic facts.—*Sewall v. Glidden*, 1 Ala. 52; *Clay v. The State*, 43 Ala. 350.

A general verdict, it is true, in favor of the plaintiff, for the lands described in the complaint, has always been held to be good in actions of ejectment.—Tyler on Eject. 580; *Chapman v. Holding*, 60 Ala. 522. But where the verdict is special, as being for a part only of the premises, or the finding has no reference to the description given in the pleadings, the boundaries of the land recovered must be designated with reasonable certainty, such as to enable the court to award judgment on it, otherwise it can not be sustained, being void for uncertainty. Code of 1876, § 2967; Tyler on Eject. 580, 785, 821; *Sturdevant v. Murrell*, 8 Port. 317; *Bennett v. Morris*, 9 Port. 171.

The verdict of the jury, in this case, fails to conform to these requirements, and is too defective to support any judgment.

The court below erred in refusing to vacate both the verdict and judgment on motion of the appellant, as also in its rulings as above particularly specified. Its judgment must, therefore,

[Hooper v. Armstrong.]

be reversed and the cause remanded, which is ordered accordingly.

## Hooper v. Armstrong.

### *Bill in Equity to Enforce Vendor's Lien; Defense, Cross-bill Claiming Sets-off.*

1. *Notes for purchase-money of land; when sets-off allowed against.* Where, contemporaneously with the execution of several notes for the unpaid purchase-money of land, an agreement in writing was entered into between the vendor and vendee, whereby the vendor agreed to furnish to the vendee a "complete chain of title to the land purchased," showing the vendor's clear right to convey the land, and for the performance of this promise it was stipulated that the notes should "be bound,"—held,

(a) That the damages resulting from the non-performance of the promise, whether regarded as liquidated or unliquidated, may be set-off, recouped, or deducted from the notes, the parties having so stipulated in their contract.

(b) That the notes having been made payable to a third party, at the vendor's request, without any consideration therefor moving from him, he takes them as a mere volunteer, and the agreement is binding on him.

2. *Special damages must be specially pleaded in equity as well as at law.* The rule in actions at law for the recovery of special, as contradistinguished from general, damages, that such damages must be specially and circumstantially stated, so as to apprise the party from whom they are claimed of the facts relied on for a recovery, and so that the court may ascertain whether, upon the facts, there is a right to compensation,—is necessarily applicable to a cross-bill in equity claiming such damages as a set-off against the demand sought to be enforced by the original bill.

3. *Cross-bill claiming special damages as a set-off; when defective.*—An averment in a cross-bill claiming, as a set-off against the demand sought to be enforced in the original bill, *special* damages resulting from the breach of a contract between the complainant and defendant, where the *general* damages appear to be merely nominal, that the complainant had thereby "damaged the defendant up to this time more than two thousand dollars," and that his damage is continuous,—is the mere conclusion of the pleader, is insufficient and can not uphold the claim for special damages resulting from the breach.

4. *Bill in equity to enforce vendor's lien; a proceeding in personam; what sets-off allowable.*—A bill in equity to enforce the equitable lien of a vendor of lands, for the payment of the purchase-money, is not a proceeding *in rem*, but strictly a proceeding *in personam* for the enforcement of a debt or demand to which the lien is an incident; and in reduction or extinguishment of such debt or demand, the purchaser whose personal liability is sought to be enforced, may set off any debt or demand which would be the proper subject of set-off, if he were sued therefor in an action at law.

5. *Same; when bill filed by assignee.*—If the bill in such case is filed by an assignee, or by any other person than the real owner of the debt, he may have the benefit of sets-off acquired and held against the assignor before notice of the assignment, or the benefit of the defense, in the other case, he could have had against the real owner.

[Hooper v. Armstrong.]

6. *Set-off*; benefit of, can be had against beneficial owner, though not a party.—The benefit of a set-off can be had against the beneficial owner of the debt, although he is not a party to the record.

## APPEAL from Lee Chancery Court.

Heard before HON. N. S. GRAHAM.

The bill in this cause was filed on the 25th of May, 1880, by Ella Armstrong, the appellee, against George W. Hooper, the appellant, and sought to enforce a vendor's lien on a lot of land situate in the City of Opelika, in this State, for an unpaid balance of purchase-money. The bill averred, that the complainant was "the owner and holder of four promissory notes, each bearing date the 4th day of March, 1874, and for two hundred and twenty-five dollars each," made by the defendant, and payable in three, six, nine and twelve months, respectively, to the complainant "by the name of Ella Bogia, which was, at the time the said notes were given, her name, but since then her name has been changed;" that the notes were given for the purchase-money of the lot described in the bill, which the defendant purchased from one Peter Bogia; that the latter executed a deed conveying the lot to the defendant; that the defendant was in possession, and that the notes were unpaid. It is not shown by the bill how or when the complainant acquired the notes.

The defendant filed an answer in the nature of a cross-bill under the statute, admitting the execution of the notes; setting up a breach by Peter Bogia of a certain agreement entered into between the defendant and Bogia contemporaneously with the execution of the notes, and seeking to set off damages alleged to have resulted therefrom against them. The provisions of this agreement, and the averments of the cross-bill as to its breach by Bogia and the damages claimed as suffered by Hooper, necessary to a proper understanding of the points decided by the court, are stated in the opinion. The cross-bill further averred, that when the notes were executed, they were, at the request of Peter Bogia, made payable to the complainant, and the complainant then endorsed on each note the words, "transferred to Peter Bogia," and signed her name thereto; that the complainant had no interest in the consideration, for which the notes were given, nor in the notes themselves, and that "said notes are, and have been since their date, the property of, and have been continuously in possession of the said Peter, and this suit is merely brought in the name of the said Ella to hinder and delay the creditors of said Peter," who, it is averred, was insolvent. The cross-bill further averred, that at the time said notes were executed, and at the time the original and cross-bills were filed in this cause, Peter Bogia was indebted to Hooper, on three several demands, which are particularly described and



[Hooper v. Armstrong.]

set forth in the cross-bill, and which are sought to be set off against the notes described in the original bill. The complainant in the original bill demurred to the cross-bill on the following grounds: 1. "The matters attempted to be set up as set-off in said cross-bill, can not be set up in a cross-bill in answer, as they do not grow out of the subject-matter of complainant's bill, and are not connected with the same." 2. "A set-off can not be pleaded to a foreclosure suit, this bill being to enforce a lien for purchase-money, and is a proceeding *in rem*." 3. "The cross-bill shows, that all the matters attempted to be set up, were owned before the giving of the notes by the defendant, and are against Peter Bogia, and the notes were made payable to complainant, and such matters can not now be set off against these notes so made payable to the complainant." She also moved to dismiss the bill for want of equity. The chancellor was of the opinion that the cross-bill was without equity "as between the said Ella Armstrong and the said G. W. Hooper;" and he caused a decree to be entered sustaining the demurrer, and dismissing the "cross-bill as such," but retaining it "so far as it is an answer, admitting or denying the allegations of the bill of complaint;" and this decree is here assigned as error.

THOS. H. WATTS, Sr., SAM'L F. RICE, and J. M. CHILTON, for appellant.

W. H. BARNES & SON, *contra*.

BRICKELL, C. J.—The contract between Hooper and Bogia stipulates that the notes given by Hooper payable to the appellee, should "be bound for the performance on the part of the said Bogia of his part of the agreement." There was in the contract but two executory promises or covenants on the part of Bogia; the one is, that he would pay certain costs in a reasonable time, and this is accompanied with a stipulation that if he failed, Hooper, on paying them, should be entitled to a credit on the notes for the amount paid. The other stipulation is, that Bogia "should execute and deliver to said Hooper a full deed, with warranty, to said land, conveying and warranting full legal and equitable title, free from all incumbrances, and he agrees further to furnish said Hooper, within a reasonable time, with a complete chain of title to said land deeded, so as to show purchasers the clear right of said Bogia to make such conveyance." It is for the performance of this promise, by the terms of the contract executed contemporaneously with the execution of the notes, the notes are to be bound. Whether the damages resulting from the non-performance of the promise, may be regarded as liquidated or unliquidated, is not mate-

[Hooper v. Armstrong.]

rial, the parties having by the contract, in effect, stipulated that they should be set off against, recouped, or deducted from the notes. The stipulation is binding on the appellee, to whom the notes were made payable at the request of Bogia, and who takes them as a mere volunteer.

The breach of the stipulation for which compensation is claimed by the cross-bill, is the failure of Bogia to furnish the chain of title, and it is averred that the failure "has damaged the defendant up to this time more than two thousand dollars, and this defendant's damage from that failure is continuous." There is no averment that there was any defect in the title of Bogia to the premises, nor that he has failed to execute a conveyance with the proper covenants of warranty. A bill in equity, whether it be an original bill or a cross-bill, must state with clearness and certainty the facts upon which the right to relief is founded; for no facts are properly in issue unless stated, and no evidence can be received, and no relief granted, upon facts not stated. A cross-bill, claiming a set-off, must disclose a state of facts showing that the complainant, or the demand he seeks to enforce, is subject to a set-off, and the facts from which the amount of the set-off can be ascertained. It may be that from the mere failure of Bogia to furnish the chain of title, the law would imply or presume nominal damages, "some very small sum, as a farthing, a penny or a sixpence," but these are too insignificant to fall within the jurisdiction of a court of equity. It is not mere nominal damages the bill proposes to set-off against the notes, but special damages it is intended to claim; and yet not a fact is stated, from which the court can pronounce that any such damage has accrued; not a fact the complainant can controvert. The averment that damages to the amount of two thousand dollars have resulted, is the conclusion of the pleader from facts which may be known to him, but which are not stated so that the complainant can controvert them, if the court was of opinion they justified the conclusion. In actions at law for the recovery of damages, if they are special, as contradistinguished from general damages; if they are not such as may be presumed necessarily to result from the breach of the contract, it is necessary to state them specially and circumstantially, that the party from whom they are claimed may be apprised of the facts intended to be proved, and that the court may ascertain, whether, upon the facts, there is a right to compensation.—1 Chit. Plead. 371. The same rule is necessarily applicable to a pleading in equity, asserting a claim to such damages.

A bill in equity for the foreclosure of a mortgage, or a bill to enforce the equitable lien of a vendor of lands for the payment of the purchase-money, is not a proceeding *in rem*. It

[Hooper v. Armstrong.]

is strictly a proceeding *in personam* for the enforcement of a debt or demand, to which the lien or mortgage is an incident, and the decree rendered binds only parties and privies.—*Boykin v. Rain*, 28 Ala. 332. In reduction or extinguishment of the mortgage debt, the mortgagor or the purchaser, whose personal liability is sought to be enforced, may set off any debt or demand, which would be the proper subject of set-off, if he were sued for the debt or demand in an action at law. And if the bill is filed by an assignee, or by any person other than the real owner of the debt, he may have the benefit of sets-off acquired and held against the assignor before notice of the assignment, or the benefit of the defense in the other case, he could have had against the real owner of the debt.—2 Jones on Mort. §§ 1496-97; Waterman on Set-off, § 97.

The several claims against Bogia, it is averred the appellant holds, are legal demands and were acquired and held by him prior to the making of the notes payable to the appellee, and prior to the making of the agreement by which the appellant expressly stipulated the lands should be bound for the payment of the notes, excepting such parts thereof as had been, or might thereafter be sold by the appellant. It is a little difficult to conceive what good reason there could have been for the execution of the notes, payable to a stranger, accompanied with a charge or lien on lands for their payment, while Bogia, from whom the consideration moved, was indebted to the appellant in a sum equal to the amount of the notes. Why, if these claims existed and were intended to be set off, was there not at once a settlement, instead of the giving of notes and the creation of a lien for their payment? If it were not for the averments of the cross-bill, that the appellee subsequently endorsed the notes to Bogia and that he is now the real holder and owner of them, we would incline to the opinion that by his own voluntary act, the appellant had waived the right to set off against these notes any claim or demand he had against Bogia. The making of the notes payable to the appellee was an admission that the money was rightfully owing to her, and not to Bogia. In her own right, an original, not derivative right, she could have demanded payment—not as the assignee or transferee of Bogia, but because of the direct promise to her.

To make a set-off available, the plea must show that the plaintiff is liable for its payment, or that he claims as indorsee or assignee, through and from some party on whom such liability rests.—*Holmes v. Bullock*, 4 Ala. 228. The cross-bill, however, contains averments that the notes have been endorsed to Bogia, and are now held and owned by him. Assuming the truth of these averments, as must be assumed on demurrer, the sets-off were properly pleaded. Against the party having the



[Mobile Savings Bank v. Fry.]

real beneficial interest in the debt, though not a party to the record, a set-off is pleadable.—*Bowen v. Snell*, 9 Ala. 481. The demurrer to so much and such parts of the cross-bill as pleaded these sets-off, ought not to have been sustained.

Let the decree be reversed and the cause remanded for further proceedings in conformity to this opinion.

## Mobile Savings Bank v. Fry.

### *Trover for Conversion of Cotton Ties.*

1. *Charges ; when part of the record.*—Charges asked by either party and refused by the court become a part of the record, when the presiding judge, on the trial of the cause, writes thereon “refused,” and signs his name thereto.

2. *Same ; when the record thereof may be looked to, in aid of bill of exceptions.*—Where the bill of exceptions shows that exceptions were reserved to charges asked by appellant and refused by the court, but fails to show that such charges were moved for in writing, and it is shown by other parts of the record, that charges corresponding to those copied in the bill of exceptions, were asked in writing, and that the presiding judge had severally written “refused” on them and signed his name thereto, the bill of exceptions comes to the aid of such charges and shows that proper exceptions were reserved to the refusal thereof.

3. *Contract of sale ; when title does not pass thereby.*—When in a contract of sale of personal property, any thing necessary to individualize the thing sold, such as weighing, measuring, counting, or separating it from a bulk, is wanting, and the thing sold is, therefore, not susceptible of identification, the title thereto does not pass by the contract to the purchaser, and he can not maintain detinue therefor, or trover for the conversion thereof.

### APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

This was an action of trover brought by the appellee against the appellant, to recover damages for the alleged conversion of 252 bundles of cotton ties, and was commenced on 8th July, 1880. The cause was tried on the plea of not guilty, and the evidence showed that in June or July, 1875, the appellee contracted with one E. G. Cunningham, who was a dealer in, and then had on hand a large supply of, cotton ties, for the purchase from him of 1000 bundles of such ties; that the ties were not then delivered to appellee, but were left with Cunningham, on storage, and afterwards, from time to time, he delivered to appellee all the ties so purchased except 252 bundles, which he had never delivered; that he had paid for said ties; and that the ties were of uniform quality and in bundles of uniform

[Mobile Savings Bank v. Fry.]

width. There was also evidence tending to show that the cotton ties so purchased were not, at the time of the purchase, or afterwards, except those which were from time to time delivered as hereinbefore stated, counted, or separated, or set apart from the other ties held or owned by Cunningham. The evidence also showed that Cunningham failed in February, 1876, and that on 21st February, 1876, the president of appellant, learning that Cunningham was in a failing condition, went to him and purchased from him for appellant all the cotton ties he then had on hand, about 400 bundles, and in payment therefor credited him with the price thereof on a debt which he owed appellant; that appellant took possession of the ties under its purchase, and sold them, partly through Cunningham as its agent, and partly through its president; and that at the time of such purchase nothing was said by Cunningham as to his title to the ties or his right to sell them, and the president of appellant did not hear of the appellee's setting up any claim to said ties until a few days before suit was brought. There was also evidence tending to show, that about the time, or just before the failure of Cunningham, the appellee suspected his solvency, and went to his store and, seeing a pile of ties, asked Cunningham if he had the balance of his ties and where they were. Cunningham replied, "Yes, there are your ties," pointing at the same time to a stack or pile of ties then in the store; but appellee did not know how many bundles were in the said pile, but was satisfied that there were more than he claimed.

The appellant asked the court to give to the jury, among others, the following charge: 1. "That if they believe from the evidence, that the ties alleged to be purchased by plaintiff had to be counted, set apart and taken from the bulk of ties owned by Cunningham before his part of them could be identified, and this was not done, then it was not a purchase and sale, but only an agreement to sell and purchase, and the plaintiff acquired no title to the ties in controversy." The court refused to give this charge, and the appellant excepted. The bill of exceptions does not show that this charge was asked for in writing; but this fact is shown by other parts of the record. The jury returned a verdict for the appellee, and the Circuit Court rendered judgment thereon in his favor; and from this judgment this appeal is taken. The refusal of the court to charge the jury at appellant's request, as above noted, is here assigned as error.

OVERALL & BESTOR, for appellant, cited *Halterline v. Rice*, 62 Barb. 593; *Magee v. Billingsley*, 3 Ala. 679; *Screws v. Roach*, 22 Ala. 675; *Browning v. Hamilton*, 42 Ala. 484; *Young v. Austin*, 6 Pick. 280; *Penn. R. R. Co. v. Hughes*,

[Mobile Savings Bank v. Fry.]

39 Penn. St. 521; *Gardiner v. Suydam*, 7 N. Y. 357; Benj. on Sales (2 Am. Ed.), § 346.

WATTS & SONS and COBBS & TOMPKINS, *contra*, cited *Magee v. Billinsky*, 3 Ala. 679; *Graff v. Fitch*, 58 Ill. 373; *Kimberly v. Patchin*, 19 N. Y. 330; *Olyphant v. Baker*, 5 Denio, 379; *Waldron v. Chase*, 37 Maine, 414; *Chapman v. Shepard*, 39 Conn. 413; *McCrae v. Young*, 43 Ala. 625; *Darnell v. Griffin*, 46 Ala. 520; Benj. on Sales, §§ 3, 213, 219; *Abraham v. Carter*, 53 Ala. 10; 22 Ala. 534; Langdell's Select Cases on Sales, p. 701.

STONE. J.—It is contented for appellee that we can not consider the first charge noted in the bill of exceptions as asked and refused, because the record fails to show it was moved for in writing. The corrected record certified in response to a *certiorari*, contains a second copy of the bill of exceptions, and it fails to affirm that the charge was asked in writing. Governed alone by the bill of exceptions, we would presume the charge was refused because not moved for in writing.—*S. & N. R. R. Co. v. Seale*, 59 Ala. 608.

There is an agreed amendment of the record, made to obviate the necessity of a *certiorari*, by which it appears, that charges corresponding to those copied in the bill of exceptions were asked in writing, and the presiding judge wrote on them severally "refused," and signed his name thereto. This constituted them a part of the record, and thus proves that they were asked in writing. The bill of exceptions comes to their aid and shows that a proper exception was reserved to the refusal. The case is thus brought within the statute and our rulings, which require that, to authorize revision, charges moved for and refused must be shown to have been asked in writing.—Code of 1876, § 3109.

When there is a contract of sale of merchandise or chattels, and any thing necessary to individualize the thing sold, such as weighing, measuring, counting, or separating from a bulk, remains to be done, the title does not pass, because the thing sold is not susceptible of identification. A thousand pounds to be weighed from a larger bulk, an hundred bushels to be measured from a crib or heap containing a larger quantity, fifty sheep to be counted from a larger flock, are all examples of executory contracts. In such cases the title has not passed to the purchaser, and he can not maintain the action of trover or detinue. The reason is, the property is not specified, and the alleged purchaser can not know or assert which is his. Benj. on Sales, § 346 and note; *Magee v. Billingsley*, 3 Ala. 679; *Tucker v. Henderson*, 63 Ala. 280.

The first charge asked by defendant fairly postulates a phase  
VOL. LXIX.



[Hirschfelder, Adm'r, v. Levy & Co.]

of the testimony, asserts a correct legal principle, and should have been given.

Reversed and remanded.

## Hirschfelder, Adm'r, v. Levy & Co.

### *Action on Account.*

1. *Account rendered ; implied admission from silence.*—Where an account is rendered by a creditor to a debtor, to which no objection is made by the latter after having a reasonable opportunity to examine it ; or where the latter retained it an unreasonable length of time without objection, ordinarily his silence will be treated as an implied admission of the justness of the debt, the inference of its correctness being more or less strong according to the circumstances of the particular case.

2. *Statement of account ; when allowed to go to the jury.*—In an action on an account, where it is shown, that the creditor had rendered to the debtor a statement of the account, which was a correct copy from the creditor's books, and to which the debtor made no objection, it is competent for a witness, who has knowledge of the fact, to testify that a statement of an account, purporting to be owing from the debtor to the creditor, shown him on the trial, is a correct statement from the creditor's books. In such case, the statement is a memorandum of the facts contained in the statement rendered the debtor ; and though not technically evidence, it may go to the jury as a memorandum of facts in evidence before them, to aid their memory as to the testimony of witnesses.

3. *Account rendered ; notice to produce not required.*—A statement of an account sent by a creditor to a debtor is not regarded as an instrument of writing, requiring notice to be given the debtor to produce it, before oral testimony as to its contents can be received.

### APPEAL from Conecuh Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action on account brought by the appellees against Y. S. Hirschfelder, under the act of January 16th, 1879, and was commenced on the 17th of February, 1880. The defendant having died after the appeal was taken, the cause was revived in this court in the name of Emanuel Hirschfelder, as the administrator of his estate. The plaintiffs in the court below filed with the clerk, when they commenced their suit, the account sued on, duly verified under the provisions of the above act ; and the defendant filed with the clerk an affidavit, also under the act, in which he deposed that "to the best of his knowledge, information and belief, the account filed in the above stated cause is not correct, and that he is not liable for the amount claimed as due therein."

On the trial, as shown by the bill of exceptions, the plaintiffs examined as a witness one Hoverman, one of the plaintiffs, who

[Hirschfelder, Adm'r, v. Levy & Co.]

testified in substance, that the defendant was indebted to the plaintiffs, but that he did not know the amount of the indebtedness, without reference to the account; that the statement of the account filed in court and shown him was made out from the plaintiffs' ledger, the entries on which were taken from their journal by their book-keeper, and was in the latter's handwriting; that witness assisted the book-keeper in making out the statement by calling out the items thereof from the books, and he saw the book-keeper write them down; that the statement was a correct copy from the books and showed the amount due from the defendant to the plaintiffs, but that he could not recollect the items without reference to the account; that monthly statements of the account sued on had been sent to the defendant by the plaintiffs and that no objection had been made thereto, until after this suit was commenced; and that he, witness, did not make any of the entries of the items embraced in the account on the plaintiffs' books. It was also shown that the account was contracted during the years 1876, 1877 and 1878. The defendant objected to the witness looking at the statement of the account shown him; the court overruled the objection and the defendant excepted. Plaintiffs then asked witness if the balance claimed as due on the account was correct, and witness answered it was. Defendant objected to both the question and the answer; the court overruled the objection and defendant excepted. Plaintiffs then asked witness to look at the account and state how much was due. Defendant objected, the court overruled the objection and permitted the witness to examine the account and answer the question, and defendant excepted. The plaintiff then offered the statement of the account in evidence, and the court, against the objection of the defendant, permitted the same "to go to the jury as evidence," and the defendant excepted.

The court charged the jury, among other things, that "they could look to the account along with the other evidence in the case, to aid them in determining what amount, if any, was due from the defendant;" and to this part of the charge the defendant excepted. There was a judgment for the plaintiffs in the Circuit Court, on verdict, and from this judgment the defendant appealed, and the errors assigned in this court are the rulings above noted.

STALLWORTH & BURNETT, for appellant, cited *Grant v. Cole & Co.*, 8 Ala. 519; *Pargoud v. Guice*, 6 La. 77; 1 Greenl. Ev. § 436; *Hudson v. The State*, 61 Ala. 334; *Memphis & Charleston R. R. Co. v. Maples*, 63 Ala. 607; 1 Greenl. Ev. §§ 436-7; *Bondurant v. Bank*, 7 Ala. 830; *Acklen's Ex'r v. Hickman*, 63 Ala. 494.

[Hirschfelder, Adm'r, v. Levy & Co.

G. R. FARNHAM, *contra*, cited 1 Ala. 321; 19 Ala. 517; 27 Ala. 377; 50 Ala. 54; 25 Ala. 57; 40 Ala. 350; 30 Ala. 242; 30 Ala. 282; 58 Ala. 349.

SOMERVILLE, J.—We can see no error in the action of the Circuit Court, allowing the account to go to the jury to be considered by them in connection with the other evidence in the case.

Its verification by affidavit, in compliance with the act of the General Assembly, approved January 16th, 1879, regulating the practice in actions on accounts, would have authorized its admission, but for the counter affidavit by the defendant, denying its correctness. This sworn contradiction, however, only destroyed its admissibility by virtue of the provisions of the statute, as *prima facie* proof of the same force as if made by deposition.—Acts 1878-79, pp. 154-5.

The evidence shows that monthly statements of the account had been sent to the defendant, and that no objection had been made by him, putting in issue its correctness, until the commencement of this suit. It is a familiar rule of law that where an account is thus presented by a creditor to a debtor and the latter makes no objection after having a reasonable opportunity to examine it; or when he *retains* it an unreasonable length of time without objection, his silence will ordinarily be treated as an implied admission of the justness of the debt, the inference of its correctness being more or less strong according to the circumstances of the particular case.—2 Whart. Ev. 1140; *Langdon v. Roane*, 6 Ala. 518.

These facts, therefore, authorized the jury to infer, in the absence of all explanation by the defendant, that he had by his silence acquiesced in the correctness of the demand, so as to render it a *stated account*.

The testimony of the witness, Hoverman, as we understand it, was not admitted for the purpose of establishing the correctness of the original book entries, of which the account is shown to be a copy. He shows himself ignorant of these entirely. Nor did he pretend to refresh his memory by reference to the items of the account so as to enable him to swear to his knowledge of the contents of such memorandum. To this end he would not have been a competent witness.—*Acklen v. Hickman*, 63 Ala. 494; *R. R. Co. v. Maples*, *Ib.* 601; 1 Greenl. Ev. §§ 436-7.

He proves, however, that the account, which was allowed to go to the jury, was a correct statement from the books kept by the plaintiffs, and to this extent identical in contents with the account proved by him to have been rendered to the defendant. It was a memorandum of the facts contained in the first copy



[Heflin v. Milton.]

which was sent to the defendant, and in the correctness of which he may have acquiesced by his silence. Such memoranda of admitted facts are frequently allowed to be put in evidence for the sake of convenience. They are not, technically speaking, evidence, but are convenient, if not frequently necessary, to aid the memory of jurors as to the testimony of witnesses. For this purpose the account was admissible, and proper to be considered in connection with the other evidence in the case.

Nor was any notice required to be given the defendant to produce the statement sent him, before receiving oral testimony as to the accuracy of the statement or memorandum allowed to go to the jury. Such memoranda are not regarded as instruments of evidence such as are required ordinarily to be produced. 1 Whart. Ev. § 152; *National Bank v. Priest*, 50 Ill. 321.

There is no error in the rulings of the Circuit Court, and its judgment is affirmed.

## Heflin v. Milton.

### *Bill in Equity to Enforce Vendor's Lien.*

1. *Statute of frauds ; when contract not affected by.*—The first clause of the statute of frauds, declaring void “every agreement which by its terms is not to be performed within one year from the making thereof,” does not apply to a contract the performance of which is dependent upon an event or contingency which may or may not happen within a year; but to contracts, which from their very nature are incapable of performance within that time, or of which, by express stipulation, performance is postponed for a longer period.

2. *Same ; sale of lands ; when void.*—The only parol contract for the lease or sale of lands, which can be withdrawn from the present statute of frauds, is where the purchase-money or a portion thereof is paid, and the purchaser put in possession by the seller. These two facts must concur; neither one without the other will satisfy the requirements of the statute.

3. *Same.*—Where no part of the purchase-money has been paid, the statute renders invalid a contract for the sale of lands, unless it is subscribed by the party to be charged. Whether that party be the vendor who is to be deprived of his estate in the lands, or the vendee upon whom the estate is to be forced, if there be not written evidence of the contract, subscribed by him, or by his agent thereunto lawfully authorized in writing, as to him the contract is void.

4. *Same ; contract for sale of lands.*—Although a purchaser, whom it is sought to charge with the payment of the purchase-money, received from the seller, and retained a contract for the sale of lands, duly executed by him, and entered into the possession of the land thereunder; yet, not having subscribed the contract himself, and not having paid any portion of the purchase-money, the contract is as to him void under the statute and incapable of enforcement.

[Heflin v. Milton.]

APPEAL from Dale Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The bill in this case was filed by William Milton against James R. Heflin and Jacob Snell, and sought the enforcement of a vendor's lien on a tract of land which was sold by the appellee and Heflin to Snell, for the payment of the purchase-money. The material facts disclosed by the record are substantially as follows: On the 8th January, 1878, and pending litigation between the appellee and Heflin as to the title to the land in controversy, both claiming to be the owners thereof, they entered into a written contract with Snell, which is in these words:

"The State of Alabama, Dale County. This instrument made and entered into this, the 8th day of January, 1878, between James R. Heflin of this State and county aforesaid, of the first part, and Jacob Snell of the second part, witnesseth: That we, James R. Heflin and William Milton have in legal controversy one certain parcel of land known as the place occupied by James Kelly, Jr., [during] 1877, and the said premises are now claimed by each party, awaiting the decision of the Circuit Court of said county; and whereas the aforesaid Jacob Snell has and does this day agree and obligate himself to pay to the successful party in said suit one hundred and fifty [dollars] at the termination thereof, for said land, we, the said James R. Heflin and Wm. Milton therefore and hereby obligate ourselves jointly and severally to make to the said Jacob Snell a title in fee simple to said premises. And we further grant and give him the right of entry and possession of said premises free of rents until the said lawsuit is at an end." This contract was subscribed by Heflin and Milton, but not by Snell. The latter, however, received and retained the contract and entered into and continued to hold the possession of the lands thereunder, but he paid no portion of the purchase-money. The bill sets out this contract, avers that the litigation between Milton and Heflin had terminated and that Milton was the successful party and then held the title to the land, and that Heflin had no interest therein.

Both defendants, among other defenses, insisted in their answers that the contract was void as against Snell under the statute of frauds, first, because it was not, by its terms, to have been performed within one year from the making thereof; and second, because it was a parol contract for the sale of land, and no part of the purchase-money had been paid by Snell. The chancellor was of the opinion, that the contract was not affected by the statute of frauds, and that the appellee, Milton, was entitled to relief; and he caused a decree to be entered declaring

[Heflin v. Milton.]

a lien on the land and ordering it sold for the purchase-money due thereon. This decree is here assigned as error.

GRIFFIN & WOOD, for appellants.

W. D. ROBERTS, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The contract is not, as is argued by the counsel for the appellants, within the influence of the first clause of the statute of frauds, declaring void “every agreement which by its terms is not to be performed within one year from the making thereof,” unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing. The present statute differs in its phraseology from the English statute of 29 Car. 2, and from our statute of 1803. These employed the same words: “Every agreement which is not to be performed within the space of one year from the making thereof.” The construction placed upon them was, as stated in Browne on Stat. Frauds, § 273, “that the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not *expected* to be performed within the space of a year from its making; but that it means to include any agreement which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance according to its language and intention within a year from the time of its making.” The changed phraseology of the present from the former statute was intended simply to adapt its language to the construction the former statute had received, without enlarging or lessening its operation. The cases are numerous in which the performance of an agreement depended upon the happening of a future event or contingency. If the event or contingency was capable of occurrence within a year, the statute was not applied to such agreements, though by possibility performance was extended, or could not be demanded for a much longer period. Whether the litigation in which the title to the land was involved, would terminate within a year from the making of the agreement, and each party placed in a condition to demand performance was uncertain; the probabilities that it would terminate within that period were at least equal to the probabilities of its protraction for a longer period. By its nature, by its terms, the agreement was capable of performance within a year. The statute applies not to contracts of this character, dependent for performance upon an event or contingency which may happen



[Heflin v. Milton.]

within a year; but to contracts which from their very nature are incapable of performance within a year; or of which by express stipulation performance is postponed for a longer period. 2 Kent. 594 *n*.

The second proposition is, that the contract is for the sale of lands, and as it is not subscribed by Snell, who is sought to be charged with the payment of the purchase-money, though under it he was let into possession, which he has retained without interruption, taking the rents and profits, it is within the bar of the statute of frauds. It must be admitted that prior to the present statute of frauds, if under a parol contract of lease or of sale, with the consent of the lessor or vendor, or with his knowledge, from which his consent was implied, the lessee or vendee entered into possession, the taking of possession, without payment of the purchase-money or any part thereof, was an act of part performance, which, in a court of equity, would have withdrawn the contract from the operation of the statute of frauds.—*Danforth v. Laney*, 28 Ala. 276; 1 Story's Eq. §§ 761–63; Pomeroy on Contracts, § 115. The present statute contains an exception of the only parol contract for the lease or sale of lands which can be withdrawn from its operation. The exception is, when the purchase-money or a portion thereof is paid, and the purchaser is put in possession by the seller. The two facts must concur—the payment of the purchase-money, or a part thereof, and the placing of the purchaser in possession. The one without the other—the possession without paying part or the whole of the purchase-money, or paying the purchase-money or any part thereof without letting into possession—will not satisfy the requirements of the statute. The introduction of exceptions to the statute of frauds, the departure from its letter and policy by courts of equity, to prevent parties through fraud from escaping performance of contracts they were in sound morality bound to perform, was much regretted. Of them it was said by Judge STORY, that “it is far from being certain, that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith and the furtherance of justice.”—1 Story's Eq. § 765. The purpose of the present statute is the exception of the only parol contract for the lease or sale of lands, which can be withdrawn from its general words. No other can be introduced or recognized by judicial decision. The mere letting of Snell into possession, and his continuance in possession under the contract of purchase can not withdraw the contract from the operation of the statute.

The words of the statute are imperative—the agreement or some note or memorandum thereof, expressing the consideration, must be in writing, and subscribed by the party to be

[Heflin v. Milton.]

charged therewith, or some other person by him thereunto lawfully authorized in writing. The statute embraces not only contracts for the sale, but contracts or agreements for the purchase of lands. It is as offensive to its letter, spirit and policy that a purchase of lands should by fraud or perjury, or by the uncertainties of parol evidence be forced upon the one party, as that the owner of lands should be deprived of his estate by fraud or perjury, or evidence resting in parol.—Browne on Stat. Frauds, § 263. “The object of the statute of frauds,” said GOLDTHWAITE, J, in *Norman v. Mollett*, 8 Ala. 546, “is to protect individuals from having parol agreements imposed on them against their consent.” All the authorities show that when a purchaser is sought to be charged with the payment of the purchase-money, the promise or agreement to pay it must be in writing, or there must be some note or memorandum in writing of the promise or agreement signed by him or his authority. In much the larger number of our cases, the effort was to charge the purchaser with the payment of the purchase-money upon contracts not in writing, or writings signed by him and yet not sufficient to meet the requirements of the statute. *Adams v. McMillan*, 7 Port. 73; *Robinson v. Garth*, 6 Ala. 204; *Knox v. King*, 36 Ala. 367; *Carter v. Shorter*, 57 Ala. 253. True, it is well settled, that the agreement or the note or memorandum thereof need not be signed, or, to employ the language of the present statute, *subscribed* by both parties, but only by him who is to be charged with it: and if signed or subscribed by him, that he is estopped from denying the execution or validity of the instrument because it is wanting in the signature of the other party. This construction does not proceed upon the ground that contracts must be mutual. The principle upon which it rests is that the statute intervenes and prevents the enforcement of contracts, which would otherwise be mutually binding, unless the party against whom it is to be enforced has furnished written evidence of his contract, has subscribed some note or memorandum thereof in writing. The agreement or contract is mutual, but the party seeking its enforcement has neglected to take from the party against whom it is to be enforced, the evidence which the statute requires must exist before it can be enforced. Though he may have given such evidence, and rendered it possible that the contract may be enforced against him, he has but his own folly or laches to blame, that he has not taken the character of evidence, which will enable him to demand performance of the contract. The difficulty is not that the contract or agreement is not mutual, but that each party has not corresponding evidence of it. But little, if any, injury can result from the settled construction of the statute, for if the party not having signed or sub-

[Heflin v. Milton.]

scribed the contract or agreement enforces it against the party subscribing, the remedies to compel performance become mutual.—3 Par. Con. 9, note; Browne on Stat. Frauds, § 466; 2 Lead. Cases Eq. Part 2, 1091. The contract or agreement, not having been subscribed by Snell, is as to him void under the statute, and incapable of enforcement. By its own terms the statute emphatically declares the invalidity of the contract unless it is subscribed by the party to be charged. Whether the party be the vendor who is to be deprived of his estate in the lands, or the vendee upon whom the estate is to be forced, if there be not written evidence of the contract, subscribed by him *or by his agent thereunto lawfully authorized in writing*, as to him the contract is by the statute pronounced void. The jealousy of all other than written evidence of the contracts mentioned in the statute of frauds, is manifested by the requisition of written evidence of the authority of an agent to subscribe them. Prior to the present statute, it was well settled that verbal authority to an agent to sign or to subscribe the contract was sufficient.—*Ledbetter v. Walker*, 31 Ala. 175. The present statute repudiates an agency created verbally, and demands that the evidence of the authority of the agent must be in writing.—*Hutton v. Williams*, 35 Ala. 503. The words, spirit and policy of the statute, can not be met and satisfied, unless there is written evidence of the contract subscribed by the party to be charged, the defendant in the action, whether he is the vendor or vendee. See note to *Corbitt v. Salem, Gas Light Co.*, 25 American Rep. 541.

That the agreement was subscribed by Milton and Heflin, delivered and retained by Snell, is certainly strong evidence that he accepted it and assented to it. It is not, however, the evidence which the statute imperatively demands, and rests in parol, the character of evidence the statute intends to exclude. In *Knox v. King*, 36 Ala. 367, the purchaser had caused a deed conveying to him the premises, and a mortgage for the security of purchase-money to be executed by himself, to be prepared. This court said: "The deed and mortgage drawn up at the instance of Mr. Knox, and by his attorney, can not aid the plaintiff's case. They were not signed by Mr. Knox, nor by any person thereunto authorized in writing." There must be a contract or agreement in writing, or a note or memorandum thereof in writing, subscribed by the party to be charged, or by his agent thereunto lawfully authorized in writing, or the concurring acts of part performance expressed in the statute, to avoid its operation. If there be not, however strong may be parol evidence that the contract was made, that it was assented to and accepted, the party is not bound, and can not be charged. There can be no relaxation of the requisi-



[Bruce v. Bradshaw.]

tions of the statute, without introducing the mischief intended to be avoided.

The decree of the chancellor must be reversed, and a decree here rendered dismissing the bill, and the appellee Milton must pay the costs of appeal, and the costs in the Court of Chancery to be taxed by the register.

## Bruce v. Bradshaw.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Act of legislature authorizing sale of decedent's land by widow, constitutional.*—An act of the General Assembly authorizing the widow to sell lands of a decedent at private sale, subject to the approval of the judge of probate of the county in which the decedent resided at the time of his death, is constitutional; and a sale and conveyance made by the widow, and approved by the judge of probate under the act, passed the legal title to the purchaser.

2. *Ejectment; title in plaintiff at time of trial necessary to a recovery.* To recover in ejectment, the plaintiff must not only have title when he institutes his suit, but also at the time of trial. If his title determines before the trial, he can not recover.

### APPEAL from Coffee Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was an action in the nature of ejectment brought under the statute by the appellants as the heirs at law of Wilkerson Ezelle, deceased, for the recovery of a tract of land in Coffee county, of which their ancestor died seized and possessed. The appellee claimed title under a sale and two deeds made by Mrs. Frances Ezelle, the decedent's widow, in pursuance of an act of the General Assembly, approved March 9, 1871 (Pamph. Acts 1870-1, p. 285), authorizing her "to sell all the lands belonging to the estate of Wilkerson Ezelle, deceased, subject to the approval of the judge of probate of said county of Coffee." This is the substance of the act. On the trial, the appellants proved title in their ancestor at the time of his death and their heirship; and the appellee read the act in evidence, and also proved that Mrs. Ezelle, with the approval of the judge of probate, sold him the lands, received the purchase-money, and executed to him two deeds, one dated 8th October, 1878, and the other, 8th March, 1881—after the commencement of this suit. The deeds are copied in the bill of exceptions, and the only substantial difference between them is, that the deed last executed recites the authority of Mrs. Ezelle to make the sale and execute the deed,

[Bruce v. Bradshaw.]

while the other contains no such recital. The approval of the judge of probate was endorsed on both deeds. This being all the evidence, the court charged the jury, at the request of the appellee, that if they believed the evidence they must find for him, and the appellants excepted. Judgment was rendered on verdict for the appellee, from which this appeal was taken. The ruling of the Circuit Court above noted is here assigned as error.

JOHN D GARDNER, and H. H. BLACKMAN, for appellant.

W. D. ROBERTS, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—We do not think this case distinguishable in principle from the many cases of statutes authorizing the private sale of lands of a decedent, which this court has pronounced valid.—Pamph. Acts 1870–1, p. 285. See a collection of the authorities in *Tindal v. Drake*, 60 Ala. 170. See, also, *Watson v. Oates*, 58 Ala. 647; Cooley on Cons. Lim. (in margin) 85 to 103. Mr. Cooley characterizes such statutes as “prerogative remedial legislation,” and cites many well considered authorities in support of the doctrine. Speaking of such statutes, BRICKELL, C. J., in *Watson v. Oates*, *supra*, said: “It is too late to re-open the discussion of the power of the legislature to enact them.”

The argument for appellants concedes that the statutory authority would have authorized the sale, if Mrs. Ezelle had been administratrix, or had sustained any relation of fiduciary trust to the heirs at law of the intestate. This argument rests on the fact that such trustees are usually under bond with sureties for the faithful administration of the trust funds committed to them. In *Tindal v. Drake*, *supra*, the legislature appointed the trustee, did not require of him any bond, and conferred on him large powers to receive the trust effects, and to sell and convey the trust property. We upheld the appointment, and the sale and conveyance made by him. The cases of *Lane v. Dorman*, 4 Ill. 242, and *Cash, Appellant*, 6 Mich. 193, referred to in Cooley on Cons. Lim. 104–5 (in margin), do not decide that a statute authorizing a sale of lands of a decedent by one who is not a trustee, or under some fiduciary relation, would for that reason be unconstitutional. It was because the special statutes passed on in those cases not only authorized sales and conveyances, but went farther, and directed to whom the proceeds and benefits should inure. In one case, the statute directed that the proceeds should be paid to one creditor, to the

[Davis v. Bedsole.]

exclusion of all others, and in the other, that the conveyance should be to a particular one of several claimants. In each of these cases, it is clear the legislature attempted to exercise judicial functions—the determination of the rights of conflicting claimants; and for that reason, the acts were rightly pronounced unconstitutional.

The present case is distinguishable from those. Here, the widow—probably the mother of the heirs—is empowered to sell. The estate, we infer, was small. We hear of only 120 acres of land, and it yielded only \$325. Eighty of the one hundred and twenty acres of the land, if not the whole, were probably exempt as a homestead, under sections 2061, subdivision 6, 3539 G, and 2860, subdivision 4, of the Revised Code, or the constitution of 1868. Moreover, the widow had a dower claim, if she chose to assert it. All these considerations tend to show that if administration had been taken on this estate, it would probably have been consumed, or very greatly reduced, in expenses. It is our duty to presume the legislature had a satisfactory reason for enacting the special statute, under which the sale was made, and the natural presumption is, that that body was reliably informed that a sale was desirable and necessary, and that those interested were poorly able to bear the expense of an administration, and a sale thereunder.

If the deed first executed in this case, and the approval thereof by the probate judge, were insufficient to convey the title, there is nothing in the objection that the second deed, and the probate judge's approval of the sale, bear date after the present suit was brought. Either conveyance was in time to divest the title of the plaintiffs before the trial was had, and that was enough to defeat the action. To recover in ejectment, the plaintiff must not only have title when he institutes his suit. He will fail if his title determines before the trial.—*Scranton v. Ballard*, 64 Ala. 402.

Affirmed.

### **Davis v. Bedsole.**

#### *Attachment by Landlord against Tenant for Rent.*

1. *Plea of former recovery; when sufficient.*—A plea of former recovery is good in bar of an action, commenced by attachment in the circuit court by a landlord against his tenant, for the recovery of rent, exceed-



[Davis v. Bedsole.]

ing in amount the jurisdiction of a justice of the peace, which avers that after the commencement of the suit the plaintiff brought an action before a justice of the peace to recover \$100 for the identical cause of action; that the plaintiff and defendant both appeared before the justice, and thereupon judgment was rendered in said suit before him for the sum of \$100 and costs, and that the judgment was still of full force and vigor.

2. *Same.*—The former recovery thus pleaded is not affected by the fact that the attachment before the justice was sued out after the commencement of the suit in which the plea was filed.

3. *Remittitur; what constitutes.*—The recovery of the judgment before the justice of the peace for \$100 was a release or *remittitur* of the balance of the plaintiff's demand.

### APPEAL from Crenshaw Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This suit was commenced by an attachment sued out by Frank Bedsole against James M. Davis before a justice of the peace and made returnable to said court, to recover damages for the alleged breach of a contract, by which Davis promised to deliver to Bedsole five bales of lint cotton for the rent of land. In a complaint subsequently filed the damages are averred to be \$350.00. To the complaint the defendant, on 13th September, 1881, filed a plea, alleging, in substance, that after the commencement of this suit the plaintiff "brought an action by attachment before Daniel H. Workman, a justice of the peace in and for the county of Montgomery, to-wit: on the 25th day of October, 1880, against the said defendant to recover one hundred dollars for the identical cause of action in this suit mentioned, and for no other, and judgment was rendered before said justice of the peace on the 22d day of November, 1880, in said suit for the sum of one hundred dollars besides costs;" that the judgement was still of full force and vigor; that in the suit before said justice of the peace the defendant and the plaintiff appeared, and thereupon the said judgment was rendered, and that the said attachment was levied on two bales of cotton of the value of one hundred dollars, by the sheriff of Montgomery county. To this plea the plaintiff filed a demurrer, assigning, in substance, the following grounds to-wit: 1. That the plea showed that the justice of the peace had no jurisdiction of the cause of action set forth in the complaint in this cause. 2. That the plea showed that the suit before the justice of the peace was commenced after the commencement of this suit, and could have been abated on the defendant's plea. 3. That the plea did not show that the judgment rendered before the justice of the peace had been satisfied. The court sustained the demurrer to the plea, and the cause was then tried on issue joined on the plea of the general issue, and resulted in a verdict and judgment for the plaintiff.

[Davis v. Bedsole.]

The error here assigned is the judgment of the Circuit Court sustaining the demurrer to said plea.

R. M. WILLIAMSON, for appellant. (No brief came to the hands of the reporter.)

GAMBLE & PADGETT, and WATTS & SONS, *contra*, cited 1 Brick. Dig. p. 7, §§ 107, *et seq.*; *Rood v. Eslava*, 17 Ala. 430; *Pace v. Dossey*, 1 Stew. 20; *Burgess & Davis v. Sugg*, 2 Stew. & Por. 341; *Perkins v. Moore*, 16 Ala. 9; *Hopkinson v. Shelton*, 37 Ala. 306.

SOMERVILLE, J.—We think the plea of former recovery in this case was good, and the demurrer to it should have been overruled. The whole matter of controversy was *res adjudicata*, having been previously determined by the judgment of a justice's court in the county of Montgomery. The two suits were between the same parties, in the same right or capacity, and the subject-matter of controversy (the rent of certain lands owned by the plaintiff and which were leased by the defendant), was the same in each suit. The justice court was a tribunal of competent jurisdiction, and the attachment suit instituted before it, for the identical cause of action here brought, terminated in a regular judgment on the merits. This involved the concurrence of every element of fact necessary to constitute a case of *res adjudicata*.—Freeman on Judgments, §§ 252, 256, 263; *Hamner v. Pounds*, 57 Ala. 348; *S. & N. R. R. v. Henlein*, 56 Ala. 368.

It can not be successfully urged that the justice's court was without jurisdiction. The allegation of the plea is that the defendant made an appearance and the justice rendered judgment against him for the sum of one hundred dollars, besides costs. Our decisions have been uniform in holding, that, in an action of this nature on a contract, and in actions on accounts, the plaintiff may before, or at the time of the rendition of judgment remit the excess of his demand over and above the sum for which the justice is authorized to render judgment, so as to bring the case within his jurisdiction.—2 Brick. Dig. p. 175, § 17, and cases cited. This principle has no application, however, to actions for the recovery of specific property.—*Carter v. Alford*, 64 Ala. 236. The obtaining of the judgment before the justice of the peace in Montgomery county for the sum of one hundred dollars was a voluntary *remittitur* by the plaintiff of the balance of his demand beyond this amount.—*Whorton v. King*, at present term—(see *post*, p. 365.)

We can not see that the case is varied by the fact that the attachment before the justice was sued out after the commence-

[Wharton v. King.]

ment of this action, and could have been abated for this reason at the option of the defendant. It is a sufficient answer to this view, that the defendant did not elect to interpose such a plea, so far as the record shows, and the plaintiff did elect to prosecute his suit to judgment in a forum of his own choosing. It is a sound public policy, having in view the tranquility of society, which forbids a plaintiff to twice vex a defendant for the same cause of action. *Nemo debet bis vexari, si constat quod sit pro una et eadem causa.*

The Circuit Court erred in sustaining the demurrer, and for this reason its judgment is reversed, and the cause is remanded.

## Wharton v. King.

### *Action on Account.*

1. *Variance between allegations and proof.*—Where, in an action on an account by K., the complaint counts on a sale of merchandise made by E. & K., as partners, to the defendant, but contains no averment that the account was the property of K., while the proof shows that the merchandise was sold to the defendant by K. & Son, a partnership, and that the account was the property of K., there is a fatal variance between the allegations and the proof.

2. *License to sell vinous or spirituous liquors; extent of authority conferred.*—A license to sell vinous or spirituous liquors issued to a firm, confers no authority to sell such liquors on another firm, a member of which is also a member of the firm to whom the license was issued.

3. *Set-off; when can not be applied as a payment.*—Set-off is a defense, and may be made or not at the option of the defendant. The plaintiff can not, in the absence of an agreement to that effect, apply it to the payment of his demand.

4. *Remittitur; right of party to make, and its effect.*—A plaintiff has a right to reduce his claim, by remitting all over one hundred dollars, so as to bring it within the jurisdiction of a justice of the peace; but when he does so, he thereby destroys the part of the claim thus remitted.

5. *Same; effect on cross demand held by defendant.*—When a plaintiff, before the commencement of his suit, without the defendant's consent, subtracted from his claim the amount of an independent claim which he owed the defendant, intending it as a part payment, and thereby reducing the amount of his claim so as to bring it within the jurisdiction of a justice of the peace; and then brought suit before that officer for the balance,—*held*, that this amounted to a *remittitur*, and not a payment, and did not impair or affect the cross demand held against him by the defendant.

APPEAL from Etowah Circuit Court.

Tried before Hon. LEROY F. BOX.

The facts are stated in the opinion.



[Wharton v. King.]

AIKEN &amp; MARTIN, for appellant.

DENSON & DISQUE, *contra*.

STONE, J.—There are two points upon which the judgment in this case must be reversed. First, on the variance between the allegations and proof. The complaint, as originally filed, counts on a sale of goods, wares and merchandise, made by Echols & King, as copartners, to the defendant Wharton. The complaint then stood in the names of W. L. Echols & W. B. King, late partners, against Benj. B. Wharton. The complaint, by leave of the court, was afterwards amended “by striking out the name of Wm. L. Echols as party plaintiff.” In all other respects it was left unchanged. It then stood as a suit by King, to recover for merchandise sold by Echols & King, with no averment that the account was the property of King. The proof tended to show that the merchandise was sold, not by Echols & King, but by King & Son, a firm composed of W. B. King, the plaintiff, and F. W. King, under the firm name of F. W. King & Son; and that the account was the property of W. B. King, the plaintiff. This variance between the allegations and proof was fatal, unless the complaint was amended so as to correspond with the proof. The account was for whiskey sold, and one ground of defense was that the sellers had no license. A license to F. W. King & Son would confer no authority on Echols & King to sell. The complaint charges that Echols & King made the sale. The court charged the jury that “if they should find that the whiskey was sold by F. W. King & Son, and the account was transferred to W. B. King, and that said F. W. King & Son had a license at the time the goods were sold (if they were), it will not be necessary for them to go any farther upon the matter of license—said license being sufficient.” This, under the averments of the complaint, was error.—1 Brick. Dig. 819; 1b. 294, § 611.

The present action was commenced before a justice of the peace, and claimed eighty-eight dollars as due from Wharton. The justice gave judgment for that sum and interest, making \$90.84. The complaint filed in the Circuit Court claimed one hundred dollars, but did not expressly claim interest. There was verdict and judgment for plaintiff for one hundred and four 75-100 dollars. One of the defenses set up was set-off, of an account due from W. B. King to Wharton for house rent, amounting to more than the sum claimed in plaintiff's complaint. The plaintiff's testimony tended to show that there was due from Wharton to King & Son, for merchandise sold, the sum of \$177.70. There was also an account due from W. B. King to Wharton for house rent. The amount of this lat-

[Wharton v. King.]

ter indebtedness was not agreed upon. King testified that the sum he owed defendant for house rent was \$98. If he was correct in this, then the balance due from Wharton was \$79.70. Wharton testified to a larger indebtedness from King for house rent. King's testimony was, "that before he brought said suit he gave defendant credit on said account for house rent in the sum of \$98, and brought suit on the balance of said account; that said credit was not given by the direction or consent of defendant; that the said credit of \$98 was what he, witness, considered due from him to the defendant for house rent. That he and the defendant never did or could agree as to the terms of said house renting, and the amount due thereon. They always differed as to this." Defendant testified "that he and plaintiff never agreed on the amount due on said house renting, and that he never consented to, or authorized plaintiff to give him credit therefor on said account." This was all the testimony bearing on the question of authority to enter the credit. The following charges were severally asked in writing by the defendant, were refused, and he excepted to each refusal: "The plaintiff can not claim in this suit more than one hundred dollars and interest"; and "if the jury believe from the evidence that Wharton did not consent to the house rent being placed as a credit on the account, then it is not settled; and they must allow whatever the evidence shows, if any thing, the house rent is worth; and it must be allowed against the account sued on in this case for less than \$100, and the jury can not put it on the \$177 account.

In the condition in which these accounts stood, what King owed Wharton for house rent was in no sense payment by Wharton, or part payment of what the latter owed the former. It might have been converted into payment, total or partial, if the parties had so agreed; but in the absence of a mutual agreement between them, it remained only a set-off, or cross demand. Now, set-off is only a defense, and may be made or not, at the option of the defendant. If he choose, he can withhold it as a defense, and bring an independent action for its recovery. And the plaintiff in a suit, against whom this cross demand exists, has no power or option in the premises. He must submit to whatever course the defendant elects to pursue.—2 Brick. Dig. 424, § 30; *White v. Governor*, 18 Ala. 767; *Brazier v. Fortune*, 10 Ala. 516; *Castleman v. Jeffries*, 60 Ala. 380; 7 Wait's Actions and Def. 473; Waterman on Set-Off, § 5. It is thus shown that King, of his own mere wish and will, had no power to reduce his claim against Wharton, by subtracting from it, as so much payment, the independent debt or liability he owed Wharton. Like any other agreement or contract, it required the assent of both parties to make it binding.

[Hall v. Green &amp; Co.]

But he did have a right to reduce his claim, by remitting all over one hundred dollars, so as to bring the claim within the jurisdiction of a justice of the peace.—2 Brick. Dig. 176, § 17. And when a release or *remittitur* is thus made, it effectually destroys the part of the claim thus remitted. To hold otherwise would be to allow a creditor to split up his demand, and carve two actions out of one contract, without the act and consent of the debtor.—*S. & N. R. R. Co. v. Henlein*, 56 Ala. 368. The result of these principles is, that King has reduced his claim to the sum he claimed before the justice, by a release of all over that sum, and has not impaired or affected Wharton's cross demand. The two charges copied above ought to have been given.

Reversed and remanded.

## Hall v. Green & Co.

### *Action on an Account.*

1. *Partnership contracts, joint and several.*—Under the statute partnership contracts and obligations are several as well as joint, whether they are verbal or written; and the members of the partnership may be sued thereon severally or jointly, at the option of the plaintiff.

APPEAL from DeKalb Circuit Court.

Tried before Hon. LEROY F. BOX.

The appellees sued Oliver L. Hall, Alexander H. Mackey and Luther C. Hall, the appellants, in *assumpsit* on an account. They are not described in the complaint as partners. The appellees having shown that the appellants were members of a partnership trading under the firm name of Hall, Mackey & Co., they were allowed by the court, against the appellants' objection, to show that Hall, Mackey & Co. were indebted to them on account, and the appellants excepted. The court, at the appellee's written request, charged the jury that "it is sufficient if the defendants were members of the firm," and the appellants excepted.

The foregoing rulings of the Circuit Court are here assigned as error.

McSPADEN & CARDON, for appellants.

L. A. DOBBS, and DUNLAP & DORTCH, *contra*.  
VOL. LXIX.



[Frank v. Pickens.]

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The judgment of the Circuit Court in this case must be affirmed, on the authority of *Hall v. Cooke*, ante, p. 87. It is there held, that the effect of our statutes is to render all partnership contracts and obligations, given within the scope of partnership dealings, *several* as well as *joint*, whether they are verbal or in writing. They are the contracts of each individual, as well as of the firm, and, therefore, the members of the firm may be sued on them severally, or the partnership may be sued jointly as such, at the option of the plaintiff.—Code of 1876, § 2904; *McCullough v. Judd*, 20 Ala. 703.

The rulings of the Circuit Court recognized this principle, and its judgment is affirmed.

## Frank v. Pickens.

*Detinue.*

1. *Mortgage of personal property; payment of debt an extinguishment of mortgagee's title.*—The payment of the debt secured by a mortgage of personal property, whether made before or after the law day, operates an extinguishment of the title of the mortgagee; and such payment is recognized, and the extinguishment is as operative, in a court of law, as in a court of equity; and upon such payment the mortgagor may maintain trover or detinue.

2. *Mortgage of personal property; whether tender of mortgage money an extinguishment of mortgagee's title—quere.*—The weight of authority is, perhaps, that a tender of the mortgage money, made after default, and after the mortgagee has taken possession, will not extinguish the title of the mortgagee under a chattel mortgage; but the question is left undecided in this case.

3. *A tender of payment, to be effectual, must be kept good.*—A tender of payment of the mortgage debt, however, whether made before or after the law day, can not operate to extinguish the title of the mortgagee under a chattel mortgage, unless it is kept good. The tender having been made, the duty rests and continues upon the party making it, to keep the money safely, and be ready to pay it over whenever the other party may manifest his willingness to accept it; and if he neglect this duty, or disable himself from performing it, he thereby abandons his tender.

4. *Rule when benefit of tender is claimed in court.*—When the benefit of a tender of payment of a debt is claimed in court, the money must be produced and placed in the custody of the court, so that, if the tender is adjudged good, the money may be awarded to the party to whom it is then ascertained to rightfully belong.

5. *When tender of payment is insufficient.*—Where, on the trial of an action of detinue brought by a mortgagor to recover personal property conveyed by the mortgage, upon a tender of payment of the debt secured thereby, made before the commencement of the suit, fifty dollars was

[Frank v. Pickens.]

deposited with the clerk—sixty dollars having been tendered before suit brought, and the evidence showing that at least the latter amount was due on the debt—and after some evidence had been introduced, ten dollars was added, making sixty dollars in all,—the tender originally made by the mortgagor was not thereby kept good, but was abandoned. No party can thus speculate on the evidence, and defer payment until it is disclosed what is the least sum he can pay, according to its weight or its tendencies.

APPEAL from Conecuh Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

The facts are stated in the opinion.

STALLWORTH & BURNETT, for appellant.

FARNHAM & RABB and P. D. BOWLES, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—This is an action by a mortgagor against the assignee of the mortgage for the recovery *in specie* of chattels. After the law day of the mortgage had passed, and there was continuous default in the payment of the mortgage debt, the assignee, with a view to foreclosure by the exercise of the power of sale contained in the mortgage, took possession of the chattels, and was proceeding to exercise the power. The mortgagor caused or procured a tender to be made to the assignee of the sum of sixty dollars, which he claimed was sufficient to pay the mortgage debt, and all legal or equitable charges. The tender was refused, and the assignee declined, stating the sum which would satisfy the debt and charges, and refused to deliver possession of the property, insisting upon making sale in pursuance of the power. On the trial the plaintiff produced and filed with the clerk of the court fifty dollars in money, and after some evidence was adduced, added ten dollars to it. There seems to have been no controversy that sixty dollars was the least sum which would redeem the property, while the defendant insisted a larger sum was necessary. The instructions given by the Circuit Court are based on the proposition, that a tender of the mortgage debt, and of legal and equitable charges, after the law day of the mortgage, and the mortgagee or his assignee has taken possession because of default in payment of the mortgage debt, will not divest the legal title and authorize the mortgagor to maintain detinue or the corresponding statutory action for the recovery of chattels. The instructions refused are based on the converse of this proposition.

That payment of the debt secured by a mortgage of chattels,  
VOL. LXIX.

[Frank v. Pickens.]

whether made before or after the law day, operates an extinguishment of the title of the mortgagee, whether the payment is made in money, or by holding the mortgagee in possession to account for the use, income or profits, was settled in this court at an early day. The payment is recognized, and the extinguishment is as operative in a court of law, as in a court of equity; and the mortgagor may maintain trover or detinue for the recovery of the chattels.—*McGowen v. Young*, 2 St. and Port. 160; *Hamer v. Harrell*, *Ib.* 323; *Deshazo v. Lewis*, 5, *Ib.* 91; *Harrison v. Hicks*, 1 Port. 423; *Brown v. Lipscomb*, 9 Port. 472; *Sims v. Canfield*, 2 Ala. 555; *Geron v. Geron*, 15 Ala. 558; *Shiver v. Johnston*, 62 Ala. 37. But an action can not be maintained against the mortgagee, nor can a recovery by him in detinue be defeated or lessened, by proof of partial payment of the debt. Nothing less than payment of the entire debt, and all just charges will enable the mortgagor to recover the chattels of the mortgagee, or defeat his recovery in detinue. In trover by the mortgagee against the mortgagor, or against one claiming under him, the rule is different, and on proof of partial payment, the recovery by the mortgagee may be limited to the amount of the debt actually due, secured by the mortgage.—*McGowen v. Young*, 2 Stew. & Port. 160; *Bell v. Pharr*, 7 Ala. 807; *Morrison v. Judge*, 14 Ala. 182. The principle of these cases is, that the title of the mortgagee is in its very nature conditional and defeasible. If the debt is paid on or before the law day, the condition of the mortgage is satisfied, the title defeated by the terms of its creation. The acceptance of payment subsequently is a waiver of the breach of the condition and forfeiture by the mortgagee, for whose benefit the condition was reserved, and is conclusive evidence of his assent to the extinguishment of his title. The payment may rest wholly in parol, but the title to personal property may be created or extinguished by parol.—*Acker v. Bender*, 33 Ala. 230; *Morrow v. Turney*, 35 Ala. 131.

The question involved in the instructions as to the effect of a tender of the mortgage debt, after default, and after the mortgagee or his assignee has rightfully taken possession of the chattels, has not been heretofore directly presented to this court. Speaking of it, the court, in *Sims v. Canfield*, 2 Ala. 555, said: "It is very possible, as the law of mortgages is understood at this day, that a tender of the money due, if made before the mortgagee acquires possession, after a default in the condition, may destroy the title of the mortgagee. However this may be, we find no adjudicated case which determines that a title once vested by possession and default, can be divested by a mere tender." The weight of authority is, perhaps, that a tender of the mortgage money, made after default, and after the



[Frank v. Pickens.]

mortgagee has taken possession, will not extinguish the title of the mortgagee. Payment operates an extinguishment because its acceptance is a waiver of the breach of the condition, and of the consequent forfeiture. But generally it is considered that a tender can not have that effect. When declined there is a refusal to waive the forfeiture; and whatever may be the risks or liabilities the mortgagee may incur, if the chattels should perish or deteriorate in value, is matter for consideration when he may seek the enforcement of the debt against the mortgagor personally, or when in a court of equity the latter may claim redemption. In view of our former decisions, we prefer to leave the question for the present undecided.

A tender before or after the law day, or before the mortgagee has taken possession, can not operate to extinguish the title of the mortgagee, unless it is kept good. There are authorities which hold that the title of a mortgagee of real estate may be extinguished by a tender of the mortgage debt, after default, and that the extinguishment will operate though the tender is not kept good. These authorities rest upon a theory of mortgages of real estate, which does not here prevail.—*Welsh v. Phillips*, 54 Ala. 309. A payment of the mortgage debt after the law day, without a re-conveyance from the mortgagee, or an entry of satisfaction on the registration of the mortgage, as required by the statute, will not in a court of law restore the fee to the mortgagor.—*Collins v. Robinson*, 33 Ala. 91; *Slaughter v. Swift*, 67 Ala. 494. A tender operates as a payment of a debt, and can operate as an extinguishment of the title of the mortgagee of chattels, for no other reason than that there was readiness and willingness to pay the debt, or to perform the condition of the mortgage, and that actual payment or performance was prevented by the wrongful refusal of the party to whom either was due, to accept it when tendered. The tender having been made, there is a duty resting upon the party making it, to keep the money safely, ready to pay it over whenever the other party may manifest his willingness to accept it. A neglect of the duty, or disabling himself from performing it, is an abandonment of the tender. And when the benefit of the tender is claimed in court, the money must be produced and placed in the custody of the court, so that if the tender is adjudged good, the money may be awarded to the party to whom it is then ascertained to belong rightfully.—*Smith v. Phillips*, 47 Wis. 202.

Upon the evidence of the plaintiff, and what occurred on the trial in the presence of the court, it is apparent the tender was not kept good. The trial was commenced and fifty dollars was deposited with the clerk, sixty dollars having been tendered before the commencement of suit. Some evidence having been

[Pollock & Co, v. Gantt.]

introduced, ten dollars is added, making sixty dollars, the sum he had previously tendered. A plea of tender, the statute requires shall be accompanied with the payment of the money to the clerk of the court. The party can not speculate on the evidence, deferring the payment until it is disclosed what is the least sum he can pay according to its weight or its tendencies. If there is error in any of the rulings of the Circuit Court, injury from them has not resulted to the appellant. Upon the undisputed evidence, he had not kept good the tender made, and upon the tender, his right of recovery in any event depended. If the present judgment were reversed, upon another trial, a judgment against him must be pronounced.

Affirmed.

## Pollock & Co. v. Gantt.

### *Action on Attachment Bond.*

1. *General rules for recovery of damages.*—Among the general rules for the recovery of damages are the following: (1). They must be the natural and proximate consequence of the wrong done, not the remote or accidental result; (2) special damages can be recovered only when they are not too remote, and are specially declared on and claimed in the complaint; and (3) what are termed speculative damages—that is, possible or even probable profits that, it is claimed, could have been realized, but for the tortious act or breach of contract charged against the defendant—are too remote and can not be recovered.

2. *Credit as a collective fact to which witness may testify.*—Good or bad credit is a conclusion of fact, partly based upon opinion, founded more or less on reputation; and to credit, as a fact, any witness shown to possess sufficient knowledge of the subject, may testify; but such witness can not speak of its value in dollars and cents, that being a matter of inference for the jury to determine.

3. *Extent of a merchant's business; when a fact to which a witness may testify.*—A witness may testify to the extent of a merchant's business, and the rate or average of profits he may realize on sales, above expenses, if within his knowledge; but he can not give his judgment or opinion as to the extent of loss a merchant will suffer by the breaking up of his business. Such question is dependent on so many elements of fact and circumstance, that any estimate that might be attempted, would necessarily be opinion or conclusion.

4. *Action on attachment bond; what damages too remote.*—In an action on an attachment bond, in which the only averment of special damage is, that "the plaintiff was engaged in the mercantile business, and had a good reputation, credit, business and good customers; and that by, and in consequence of the levy of said attachment on his property and effects, his business, reputation and credit have been destroyed and lost, and his customers have withdrawn, to the loss and special damage of the plaintiff," etc., it is not competent for the plaintiff to show, that at the time of, and prior to the levy he was making advances to timber-men and others,

[Pollock &amp; Co. v. Gantt.]

and that thereby he had become interested in the handling of timber and crops, and that his mercantile business being stopped, he lost these advantages, and lost his advances and the shipment of his timber. Such matters are inadmissible, because there is no averment in the complaint authorizing them, and on the further ground, that if there had been such an averment, the damages claimed on account thereof, are speculative and too remote.

5. *Attachment sued out by agent ; for what damages the principal liable.* Where an attachment was sued out by an agent, and it is neither shown that he was thereunto authorized or instructed, nor that the principal ever repudiated the suit, this subjected the principal to actual damages, if no cause existed for suing out the process; but he is not responsible for the malice, vexatious conduct, or wantonness of the agent, unless he caused, or participated in such evil motive or conduct.

6. *When prior attachments admissible on trial of action on attachment bond.*—It is competent for a defendant to prove, for the purpose of affecting the recovery of exemplary or vindictive damages, that prior to the issuance of his attachment, his agent by whom it was sued out, had notice that other creditors of the plaintiff had, on that day, obtained attachments against him on the same ground as that alleged in defendant's attachment. But such testimony can not affect the actual damages which the plaintiff is entitled to recover.

7. *Attachment ; when wrongfully sued out.*—No matter how well founded the belief of the attaching creditor, that a statutory ground exists for suing out the attachment, if he be mistaken or misinformed, and no ground in fact exists therefor, then the attachment is wrongful, and there may be a recovery of the actual damages sustained, which is measured by the actual injury which the issue and levy of the attachment occasioned.

#### APPEAL from Conecuh Circuit Court.

Tried before HON. JOHN P. HUBBARD.

This was an action by M. A. Gantt, the appellee, against J. Pollock and others, the appellants; was commenced on 18th July, 1881, and was founded on a bond executed by the appellants to procure an attachment in favor of Pollock & Co. against the appellee. The attachment was sued out by one Weil as the agent of Pollock & Co. on the 13th April, 1881, and was levied on the next day thereafter by the sheriff of Conecuh county, on a stock of goods, wares and merchandise belonging to the appellee. On the trial the plaintiff in the court below read to the jury the papers relating to the attachment suit, and was then examined as a witness on his own behalf, and he testified, in substance, among other things, as follows: That at the time of the issuance and levy of the attachment, he was in the timber business, and was furnishing advances to farmers under crop liens and mortgages, and to "timber-getters" under contracts, such advances to be made along during the year 1881, his trade being about \$15,000.00 a year, and that by reason of the attachment he failed to meet his contracts for advances, and thereby he sustained loss; and that at that time he was doing a general mercantile business in the town of Evergreen. He was then asked by his counsel this question: "How much



[Pollock &amp; Co. v. Gantt.]

business would you have done on the contracts in the year with the customers to whom you had begun to advance, if you had gone on," to which he answered, "some ten or fifteen thousand dollars." The plaintiff having further testified, that his credit was, prior to the issue of the attachment, good for \$10,000.00 or \$15,000.00, was asked by his counsel this question: "What sort of credit did you have when the attachment was sued out," to which the plaintiff answered, "I had a good credit and could buy all the goods I wanted." He was then asked by his counsel this question: "Since the levy of the attachment, what is your credit worth," to which he replied, "I have had no credit since that time. My credit was ruined." He was then asked by his counsel this question: "What effect did the levy of the attachment have as to the contracts existing with you and your customers, as to your being able to collect or not collect them," to which he replied, "it had a bad effect, it forced my customers to other places to trade, and they paid their accounts there first." He was then asked this question by his counsel: "Have you been unable to comply with your contracts so that your customers would not comply with theirs," to which he replied, "I have been unable to carry out my contracts, and in many cases my customers would not pay me for that reason." He was then asked this question by his counsel: "What effect did it have on your timber business," to which he answered, "it had a pretty bad effect, stopped the business, was not able to carry the contracts through, and some timber that I got out could not be gotten off and is rotting in the woods." He was then asked by his counsel this question: "How much was the timber lying in the woods which you failed to get off, worth," to which he answered, "about one thousand dollars." To each of these questions and to the answers thereto, the defendants duly and separately objected, and their several objections having been overruled by the court, they separately excepted.

The defendants, among other things, showed, that prior to the issuance of the attachment by Pollock & Co., other attachments had been sued out against the plaintiff by other of his creditors, on the same ground, and levied on his stock of goods, wares and merchandise; and they thereupon offered to prove, that the agent of Pollock & Co., who sued out their attachment, before doing so, had notice that the other attachments had been issued and levied; but the court, on objection by plaintiff, refused to allow the defendants to make the offered proof, and they excepted. Numerous other exceptions were taken by defendants to the rulings of the Circuit Court on the trial, but it is not necessary to set them out. The other material facts are stated in the opinion. The jury brought in a verdict for the plaintiff, assessing his actual damages at \$300.00 and his vin-

[Pollock &amp; Co. v. Gantt.]

dictive damages at \$1,000.00, on which a judgment was rendered against the defendants. The rulings of the Circuit Court above noted are among the errors assigned by the appellants.

FARNHAM & RABB, for appellants.—(1). The defendant in attachment, in an action on the attachment bond, is not entitled to recover damages which are not the natural, proximate, legal result or consequence of the wrongful act. Remote and speculative damages are not recoverable.—Drake on Att. §§ 175–8, and cases cited; *Donnell v. Jones*, 13 Ala. 490, and cases cited. (2). In such action proof of speculative damages arising from loss of reputation, credit or business, or the withdrawal of particular customers can not be made, unless such special damages are averred in the complaint.—*Donnell v. Jones, supra*; *Lewis v. Paull*, 42 Ala. 136; *Dothard v. Sheid, ante*, p. 135. (3). “The general rule requires, that witnesses should depose only to facts, and such facts too, as come within their knowledge. The expression of opinions, the belief of the witness or deductions from the facts, are not proper evidence as coming from the witness, and when such deductions are made by the witness, the province of the jury is invaded.” *Brice & Co. v. Lide*, 30 Ala. 647, and cases cited. (4). To repel the imputation of malice, the fact that other attachments, of which the plaintiff therein had notice, had been issued, is competent evidence.—*Cuthbert v. Newell*, 7 Ala. 457; *Yarborough v. Hudson*, 19 Ala. 653; *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142; *Lockhart v. Woods*, 38 Ala. 631. (5). In this action malice of an agent can not be imputed to the principal; and where, as in this case, the attachment was sued out by an agent, no vindictive damages can be recovered.—*Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 Ala. 492.

STALLWORTH & BURNETT, *contra*. (No brief came to the hands of the reporter.)

STONE, J.—The present is a suit by a merchant, and complains that Pollock & Co. wrongfully and vexatiously sued out an attachment against him, and procured it to be levied on his stock of merchandise. The suit is on the bond given to procure the attachment. The special ground of the attachment was, “that the said M. A. Gantt has moneys, property or effects liable to satisfy his debts, which he fraudulently withholds.” Two other attachments had been previously, but on the same day, sued out against Gantt by other creditors, and had been levied on the same stock of merchandise. The ground on which those other attachments were issued, was the same as that on which the present one was sued out; and the

[Pollock &amp; Co. v. Gantt.]

recoveries in those prior suits greatly exceeded the sum the merchandise yielded, after setting apart to the defendant one thousand dollars in value of the goods, claimed and allowed to him as exempt. The attachment in favor of Pollock & Co. was sued out by an agent, and the record is silent as to the authority under which the agent acted. The complaint sets forth a copy of the bond, avers that the alleged ground on which the attachment was issued is untrue, and avers separately, first, that it was wrongfully sued out, and, second, that it was wrongfully and vexatiously sued out. It contains also an averment of special damage, "that at the time of suing out and levy of said attachment on the goods, wares, chattels and merchandise of the plaintiff, by the defendants, J. Pollock & Co., he, the plaintiff, was engaged in the mercantile business, and had a good reputation, credit, business and good customers; and that by, and in consequence of the levy of said attachment on his property and effects, his business, reputation and credit have been destroyed and lost, and his customers have withdrawn—to the loss and special damage of the plaintiff," etc. It will be observed that the special damage herein averred, relates to his reputation and credit as a merchant, and the value and profitableness of his business as a merchant.

Among the general rules for the recovery of damages, are the following: that they must be the natural and proximate consequence of the wrong done; not the remote, or accidental result. And special damages can be recovered only when they are not too remote, and are specially counted on and claimed in the complaint. What are termed speculative damages—that is, possible or even probable profits that, it is claimed, could have been realized but for the tortious act or breach of contract charged against defendant—are too remote and can not be recovered.—*Culver v. Hill*, 68 Ala. 66; *Donnell v. Jones*, 13 Ala. 490; *O'Grady v. Julian*, 34 Ala. 88; *Bolling v. Tate*, 65 Ala. 417; *Sims v. Glazener*, 14 Ala. 695; *Burton v. Holley*, 29 Ala. 318; *Higgins v. Mansfield*, 62 Ala. 267.

The ground on which special damages are claimed in this case, may be summarized as follows: That plaintiff was a merchant of good reputation and credit, had good customers and was doing a good business, and that by the issue and levy of the attachment, his credit was destroyed, and his business broken up. The issue formed on these averments opened the door for proof and disproof of every material fact embraced within the issue thus formed. It opened the door no wider. It did not let in evidence of any special damage, of which the averments in the complaint give no notice. This, for the obvious reason, that any other rule would operate a surprise and injustice to the defendants. Hence the rule requiring special averments, to



[Pollock &amp; Co. v. Gantt.]

authorize a recovery of special damages. And if the damages claimed be of the class called speculative, or otherwise too remote, even special averments will not authorize their recovery.

The general rule is that only facts can be given in evidence. Facts are sometimes simple, sometimes collective. Still, the witnesses speak only of facts. It is for the jury to draw inferences and conclusions. There are exceptions to this rule. Experts can testify to opinions; and there are many questions upon which a non-expert witness may express his judgment or opinion. Value, length of time, distance, and many others, fall under this class. So, good or bad character, good or bad credit, is a conclusion of fact, partly based on opinion and judgment, founded more or less on reputation; and, the proper predicate being laid, any one may testify to it as a fact; a collective fact, made up of many known ingredients. The proper predicate to be laid is, that the witness has sufficient knowledge of the subject—character or credit—about which he proposes to testify. So, if a witness has sufficient knowledge, he can speak of credit as a fact, and the extent of it. He can not speak of its value in dollars and cents. That is a question of inference for the jury to draw. And a witness may testify to the extent of a merchant's business, and the rate, or average of profits he may realize on sales, above expenses, if these are matters within his knowledge; but he can not give his judgment or opinion as to the extent of loss a merchant will suffer by the breaking up of his business. Such question is dependent on so many elements of fact and circumstance, that any estimate that might be attempted, would necessarily be opinion, or conclusion. This is a question for the jury, not for direct testimony.

Proof was offered by plaintiff, and received by the court against the objection of defendants, that plaintiff was making advances to timbermen and others, and that thereby he had become interested in the handling of timber and crops; and his mercantile business being stopped, he lost these advantages, lost his advances, and lost the shipment of his timber. These matters of proof, each and all, were inadmissible. There was no averment in the complaint to authorize them, and if there had been, the damages claimed on those accounts are speculative and too remote.

In this case the attachment was sued out by an agent, and there is no proof that the agent was authorized or instructed to sue out the process. Neither is there proof that the principal ever repudiated the suit. It was prosecuted to judgment. This subjected the principal to actual damages, if no cause existed for suing it out. He would not be responsible for the malice, vexatious conduct, or wantonness of the agent, unless

[Burks v. Hubbard.]

he caused, or participated in such evil motive. Malice or vexatiousness in the agent, and only in him, does not expose the principal to vindictive damages.—*Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 Ala. 492. The defendants ought to have been permitted to prove, that previous to the suing out of their attachment, the agent by whom it was done, was notified that other creditors of the plaintiff had on that day sued out attachments against him, on the same alleged ground as that set forth in defendant's attachment. This testimony was admissible on the question of exemplary or vindictive damages. It does not bear on the question of actual damages. No matter how well founded the belief of the attaching creditor, that a statutory ground exists for suing out the attachment, if he mistake, or be misinformed, and there be in fact no ground for this extraordinary process, then the attachment is wrongful, and there may be a recovery of the actual damage done. This is measured by the actual injury which the issue and levy of the particular attachment occasioned. It extends no farther.

Several of the rulings of the Circuit Court are not reconcilable with the views expressed above.

Reversed and remanded.

## Burks v. Hubbard.

### *Trover for the Conversion of Cotton.*

1. *Agent; authority to sell does not include authority to sell on credit.* It is a principle well settled in the law of agency, that an authority given an agent to sell, does not carry with it an authority to sell on credit, but for cash only, unless such be the usage of trade.

2. *Special agent; no authority to pay his own debts with property of principal.*—A special agent clothed with authority to sell property placed in his possession, can not do so by disposing of such property in payment of his own debt. A valid exercise of his authority requires that the transaction should be one for the benefit of the principal and not of the agent—a sale proper and not a mere barter.

3. *Same; parties dealing with bound to ascertain extent of authority.* Any one dealing with such special agent is bound, at his own peril, to ascertain the extent of his authority.

4. *Party in possession of mortgaged personal property; onus on him to show that his possession is rightful.*—Where personal property covered by mortgage is traced into the possession of a party who had constructive notice of the mortgage, and he seeks to defend his possession by showing that it was rightful, the burden rests upon him to prove his defense. And if he seeks to do this, by showing a purchase of the property from the mortgagor acting as the agent of the mortgagee, he must show that the mortgagor, as such agent, had authority to sell, and that, in making the

[Burks v. Hubbard.]

sale, the authority conferred upon him by the mortgagee was strictly followed; and that, if such authority was restricted to a sale for cash, cash was in fact paid for the property.

5. *Agent's authority to sell; repudiation of, by principal.*—In an action of trover brought by a mortgagee against a party who claims to have purchased from the mortgagor as the agent of the mortgagee, it is competent for the plaintiff to show a prompt repudiation of the mortgagor's alleged authority to sell, and the absence of such acquiescence as might have been construed into a ratification of the sale. And for this purpose, the debt secured by the mortgage being for rent and advances due from the mortgagor, as tenant, to the mortgagee, as landlord, the fact, that the latter had sued out an attachment against the former for the recovery of such rent and advances, is relevant, and the writ of attachment is admissible in evidence for the sole purpose of showing this fact.

6. *Market price of property; how proved.*—The market price of property being a conclusion which is largely made up of presumptions, may always be proved by the opinions of witnesses, based, of necessity, in part at least, on hearsay.

7. *Trover; measure of damages.*—In trover it is competent to prove the highest value of the property alleged to have been converted at any time between the date of conversion and the time of the trial, as it is within the power of the jury, in this action, to assess the damages of the plaintiff at a sum based on such value, or on a value not less than that of the property converted at the date of the conversion, with lawful interest.

8. *Same.*—The discretion of the jury, in selecting the exact period of valuation, in trover, should be exercised in such manner as to prevent the defendant from reaping pecuniary profit through his wrongful act, and, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages, as exact justice may require.

#### APPEAL from Montgomery Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This action was brought by Samuel D. Hubbard, Jr., against W. B. Burks, George P. Burks and S. J. Rushton, and was commenced on the 26th of February, 1879. The complaint contained three counts, the first of which was in trover for the alleged conversion by the defendants of eighteen bales of cotton; the other two counts were in case, the averments of which it is unnecessary to set out, as the cause was tried on the first count. The plaintiff claimed title to the property alleged to have been converted, under a mortgage executed by one S. M. Jones, who, as plaintiff's tenant, had cultivated lands belonging to plaintiff in Montgomery county, and had raised thereon a crop of cotton. As shown by the bill of exceptions, the defendants pleaded in short, by consent: 1st. "The general issue with leave to give in evidence any matter of defense, or in bar, which could be specially pleaded or replied;" 2d. "A special plea that the plaintiff had given his tenant, S. M. Jones, permission or authority to sell the cotton in controversy; and that the cotton purchased by defendants from said tenant Jones, was bought by them after said authority had been given by plaintiff to said Jones, as aforesaid; and that said cotton was sold by Jones to



[Burks v. Hubbard.]

defendants under and in accordance with said permission or authority." Upon the issues thus presented the cause was tried. On the trial, the plaintiff read in evidence a mortgage executed by S. M. Jones, on the 6th of October, 1877, duly acknowledged and recorded in the office of the judge of probate of Montgomery county, conveying, among other things, "the entire crop of cotton . . . which may be produced" on lands in said county belonging to plaintiff and called the "Bentley Place," during the year 1878. The testimony of witnesses examined on the trial tended to show, that Jones cultivated said place during said year, as the tenant of plaintiff, and raised a crop of cotton thereon; that plaintiff had not fully collected the debt secured by the mortgage, and that Jones, during the latter part of 1878, sold and delivered to defendants thirteen bales of cotton. The evidence was conflicting as to what part of this cotton was raised on the "Bentley Place;" the evidence introduced on behalf of the plaintiff tending to show that all of it was raised on said place, while that introduced on behalf of the defendants tended to show that only seven bales thereof were raised on said place. The plaintiff introduced and examined as a witness one C. A. Allen, who testified, "that he is now, and has been for years past, engaged in the cotton and warehouse business, and is acquainted with the current prices and market value of cotton. Plaintiff, thereupon, asked said witness to state, if he knew, the highest point or price to which cotton had reached at any given time since the 1st day of October, 1878. Defendants objected to this question, but the court overruled the objection and allowed the witness to answer. To this ruling of the court defendants duly excepted. Witness then answered, that the price of cotton depended largely upon the grade or quality, the character of the soil upon which it was grown, and upon a variety of other causes and circumstances; and that the highest and best grade of cotton, for a very short time during the spring of 1879, touched thirteen cents per pound. Defendants objected to this answer and moved to exclude the same; but the court overruled the objection and motion, and defendants duly excepted." The plaintiff also offered in evidence "the attachment proceedings in the case of S. D. Hubbard v. S. M. Jones, in the Circuit Court of Montgomery county, decided at the December Term, 1878, of said court, including therein the affidavit, bond, attachment writ, the levy of the sheriff endorsed on the writ and the judgment entry in said cause. To this defendants objected, but the court overruled the objection so far as to permit the writ of attachment in said case, with the sheriff's levy endorsed thereon, to go in evidence to the jury, only to show that an attachment had been issued and levied, to which ruling of the court" defendants excepted. The plaintiff then

[Burks v. Hubbard.]

read in evidence the said writ with the levy of the sheriff endorsed thereon, which is made an exhibit to the bill of exceptions, is dated the 25th October, 1878, and shows that it was issued to attach the crops raised by said Jones during said year on the "Bentley Place," to pay the debt which was secured by said mortgage to plaintiff, and that it was levied on part of said crops, on the same day it was issued. The evidence further tended to prove, that on the 1st day of August, 1878, said Jones was indebted to defendants in the sum of about \$150.00, which amount was paid to defendants by Jones out of the proceeds of the sale of the thirteen bales of cotton which they purchased from him during the latter part of 1878; that after the 1st day of August, 1878, said Jones made some small purchases from defendants of goods and merchandise, the particular amount and value of which the defendants did not show, which were paid for out of the purchase-money of the cotton, by defendants giving Jones credit therefor, and paying him the balance in money along as the cotton was bought; that the balance of the proceeds of the thirteen bales of cotton was paid in money to Jones by defendants; that said cotton was purchased prior to 25th October, 1878, in open market, upon the public streets of Montgomery, in the usual course of trade, in good faith and without any knowledge or notice, on part of defendants, that plaintiff had or claimed to have any interest in or lien upon said cotton. Evidence was also introduced on the trial tending to show, that prior to the purchase by defendants from Jones of said thirteen bales of cotton, or any part thereof, plaintiff had given Jones authority to sell the cotton raised on the "Bentley Place" during the year 1878.

The court, on the written request of the plaintiff, gave to the jury the following charges: 1. "If the jury find that plaintiff authorized Jones to sell the cotton raised on said Bentley place for the purpose of getting the money therefor, and paying it to plaintiff, then this did not authorize Jones to dispose of said cotton in payment of any debt he owed, or for any thing but money, which he could pay the plaintiff, and if defendants received said cotton in payment of any debt Jones owed them, such sale was not authorized by such agency conferred upon Jones by plaintiff, if the jury find that this was all the authority Jones had to sell the cotton." 2. "If the private instructions to Jones to sell for money to be paid to plaintiff was a part of the authority to sell the cotton, this constituted Jones a special agent, and defendants bought at their risk, as to the extent of such authority." 3. "The burden of showing the amount of money paid by defendants to Jones, and the amount of credit to Jones' account, of the proceeds of the cotton, rested upon the defendants; and if they have failed to show these respect-

[Burks v. Hubbard.]

ive amounts, they are liable, if at all, for the value of all the cotton of plaintiff purchased by them of Jones." To the giving of each of these charges the defendants separately excepted. The jury returned a verdict in favor of the plaintiff, on which the court rendered judgment; and from this judgment the defendants appealed, and here assign as error the several rulings of the Circuit Court, to which exceptions were reserved, as above noted.

RICE & WILEY, for appellant.

T. M. ARRINGTON, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—It is a principle well settled, in the law of agency, that an authority given an agent *to sell* does not carry with it an authority to sell *on credit*, but for *cash* only, unless such be the usage of trade.—1 Parsons on Cont. 50; *Falls v. Gaither*, 9 Port. 605. Nor can a special agent, entrusted with the possession of property, who is authorized to sell it, do so by disposing of it in payment of his own debt. A valid exercise of his authority requires that the transaction should be one for the benefit of the principal and not of the agent—a sale proper, and not a mere barter.—Benjamin on Sales, § 742; *Powell's Adm'r v. Henry*, 27 Ala. 612.

And one dealing with such special agent is bound at his own peril to ascertain the extent of his authority.—*Cummins v. Beaumont*, 68 Ala. 204; 1 Brick. Dig. p. 55, § 35.

The first two charges given by the court recognized these principles, and were authorized by the evidence.

Nor do we see that there was any error in the last charge in regard to the burden of proof. When the plaintiff proved the possession by him of a mortgage on the cotton purchased by the defendants, and that they had constructive notice by the fact of its being recorded, it devolved on the defendants to show that their possession was rightful. This they sought to do by showing a purchase from one Jones, who was alleged to have authority to sell the cotton as the agent of the plaintiff. This authority being only to sell for cash, and its exercise being invoked as a defense, the strict and lawful pursuance of it must be proved. The *onus* always rests on each party to prove every material fact necessary to make out his case, or defense. As defendants might be liable for all the cotton traced into their possession, even if Jones had authority to sell, they could only rebut this *prima facie* case by proving that they paid *money* or *cash*, the sole consideration for which they could buy. It is



[Burks v. Hubbard.]

true that they would be relieved of liability so far as they did pay money, and would only be liable to the extent of Jones' account which he sought to pay with his principal's property. Nevertheless the burden of proof rested on them to show these respective amounts, and this was all the charge in question intended to assert.—1 Whart. Ev. § 358.

The fact that an attachment was sued out against Jones by the appellee, Hubbard, was relevant, and the writ of attachment was properly admitted in evidence for the sole purpose of proving this fact. It was competent to show a prompt repudiation of Jones' alleged authority to sell the cotton, and an absence of such acquiescence as might have been construed into a ratification of the act.

The testimony of Allen as to the price of cotton was properly admitted. Taken in connection with the preceding interrogatory and answer, it obviously had reference to the *market* price of cotton, a conclusion which is largely made up of presumptions, and may always be proved by the opinions of witnesses based of necessity, in part at least, on hearsay.—1 Whart. Ev. § 448.

It was also competent to prove the *highest* price of cotton at any time between the date of conversion and the time of the trial, as it was within the power of the jury, in an action of *trover*, to assess the damages of the plaintiff at a sum based on such price, or on a price not less than the value of the cotton at the date of conversion, with lawful interest.—*Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213. This discretion of the jury, in selecting the exact period of valuation, should be exercised in such manner as to prevent the defendant from reaping pecuniary profit through his wrongful act, and, at the same time, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages, as exact justice may require.—*Williams, Adm'r, v. Crum*, 27 Ala. 468; *Loeb Bros. v. Flash Bros.*, 65 Ala. 526; 6 Wait's Act. and Def. p. 222, § 9.

We discover no error in the record, and the judgment of the Circuit Court is affirmed.

[Costephens et al. v. Dean et al.]

**Costephens et al. v. Dean et al.***Bill in Equity by Distributees to enforce a Vendor's Lien for unpaid Purchase-money of Land sold by Decedent.*

1.—*Interest of legatees or distributees in personal assets.*—Distributees or legatees have no title to the personal assets of a decedent's estate, and are not appointed by law to demand or receive them. All their interest is secondary, and is capable of conversion into unqualified ownership only through the process of administration.

2. *Right of legatees or distributees to sue in respect to personal assets.* In respect to such assets, distributees or legatees, as a general rule, can not sue any other person than the executor or administrator, because there is a want of all proper privity between them and persons who may have possession of personal assets, or may have converted them, or, when the assets are in the form of debts, between them and the debtors.

3. *Same.*—There are exceptional cases, however, in which this court, venturing beyond established precedents and decisions, has dispensed with the presence of a personal representative, and permitted the next of kin to sue, or distribution to be made to them directly; but in each of these cases there existed some special facts, indicating clearly that there was no necessity for an administrator, that if one was appointed, his only duty would be to receive with one hand, and with the other make distribution; or that without administration, the parties in interest being adults, had made division themselves.

4. *When distributees can not maintain bill in equity to enforce vendor's lien.*—But where the decedent was, at the time of his death, an adult citizen of this State, his distributees can not maintain a suit in equity to enforce a vendor's lien for unpaid purchase-money of lands sold by him, upon the sole averment that he died about thirteen years before the filing of the bill, leaving no debts, and that no administration had ever been had upon his estate.

5. *Bill by distributees in respect to personal assets; when widow should be made a party.*—If such a suit could be maintained by distributees, the widow, being entitled to share in the personal assets, should be made a party to the bill; and the failure to make her a party is fatal on demurrer to the complainants' right of recovery.

**APPEAL from Etowah Chancery Court.**

Heard before Hon. H. C. SPEAKE.

The bill in this cause was filed on 8th March, 1879, by the appellants, as the only heirs at law of William C. Costephens, deceased, against the appellees, to enforce a vendor's lien for an unpaid balance of the purchase-money for certain lands, which William C. Costephens sold and conveyed in his lifetime. The complainants aver in their bill that "their father, William C. Costephens, departed this life in Alabama some time during the year 1866 or 1867, and left surviving him, as his heirs at law and all his heirs at law, your complainants, and that their

[Costephens et al. v. Dean et al.]

said father died intestate, and there has never been any administration on his estate, and that he left no debts, and there is no necessity for an administration." Two of the complainants were minors when the bill was filed. The appellees answered the bill, and incorporated in their answer a demurrer, the grounds of which are, (1) that the bill should have been filed by the personal representative of complainants' father; (2) that the bill does not show any right in the complainants to file it; and (3) that the widow of the intestate should have been made a party defendant. On the hearing, had upon the demurrer, a motion to dismiss the bill for want of equity, and upon proof, the Chancery Court entered a decree overruling the demurrer, but dismissing the bill on the facts disclosed by the evidence. The view taken by this court on the questions raised by the demurrer, renders unnecessary a fuller statement of the case made by the record. The decree dismissing the bill is here assigned as error.

DENSON & DISQUE, for appellants.

AIKEN & MARTIN, and JOHN W. INZER, *contra*.

BRICKELL, C. J.—The bill is filed by the appellants, as the next of kin of William C. Costephens, deceased, entitled to distribution of his estate, to enforce a lien on certain lands for the payment of promissory notes given for the purchase-money thereof by one Green, payable to said William C., who in his life bargained, sold and conveyed the lands to said Green. The primary question is, whether the appellants are entitled to maintain the suit, or whether it should have been instituted by an administrator of said William C. who is averred to have died about thirteen years before the filing of the bill, leaving no debts.

As a general principle, the law recognizes an executor or administrator as the only representative of the personal assets of a decedent. His title to them is exclusive, and whatever may be the lapse of time intervening between the death of the owner and the grant of letters of administration, or letters testamentary, the title relates to the death, and he may maintain suits to reduce them into possession, whether they were at the time of the death, choses in action, or were subsequently taken and converted.—1 Brick. Dig. 932, §§ 261–64. In trust he holds them, first for the payment of debts, and secondarily, in cases of intestacy, for distribution to the next of kin, or where they have been bequeathed, for the benefit of legatees. The trusts are charged upon the legal title, and that resides solely and exclusively in the personal representative, until dis-



[Costephens et al. v. Dean et al.]

tribution is made, or by an assent to legacies, he may part with it.

In the subject-matter of a suit involving the personal assets, distributees or legatees have an interest differing only in degree from that of creditors. In respect to such assets, however, they can not generally sue any other person than the executor or administrator, because there is a want of all proper privity between them and persons who may have possession, or may have converted them, or when the assets are in the form of debts, between them and the debtors. They have no title to the assets, and are not appointed by law to demand or receive them; all their interest is secondary, and is capable of conversion into unqualified ownership, only through the process of administration. To support an action at law, or a bill in equity, the plaintiff must have more than an inchoate, qualified interest in the subject-matter of suit. Borrowing the appropriate language of Mr. Daniell, "a bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but it must also show that there is such a privity between him and the plaintiff, as gives the plaintiff a right to sue him; for it is frequently the case, that a plaintiff has an interest in the subject-matter of the suit, which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand." An illustration or an instance of the rule he mentions, is of an unsatisfied legatee having an interest in the personal estate of his testator, a clear equity to compel its due administration, and yet, is without right to institute suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts, that they may be applied in satisfaction of his legacy; "for there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator."—1 Dan. Ch. Pr. 322. In *Gardner v. Gantt*, 19 Ala. 666, it was said by DARGAN, C. J.: "The distributees or next of kin can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been duly granted upon the estate of the deceased. This principle is well settled by authority, but even without decided cases, no other rule could obtain, for the reason that the law casts the title to all the personal estate of the decedent upon his personal representative. It is true, that he holds the title as trustee to pay the debts, in the first instance, and then to make distribution according to the statute amongst those entitled. But until letters of administration have been granted, the legal title can not be brought before the court, and, therefore, it can not be bound by a decree, nor can the

[Costephens et al. v. Dean et al.]

court see that the trusts have been executed. For instance, if the next of kin should file their bill for distribution, and a decree should be rendered, it could not bind the administrator who might be afterwards appointed; nor would such a decree afford the slightest protection to those against whom it might be rendered, as against the claims of the administrator." In the later case of *Dugger v. Tayloe*, 60 Ala. 504, it is said: "The general rule in a court of equity is, that neither creditors, nor distributees, nor legatees, can maintain a bill against debtors of an estate, to subject debts they may owe to the satisfaction of their demands. There is a want of privity between them and the debtors, and it would introduce confusion in the administration of the assets, and displace the power of the personal representative. There are exceptions to the rule; as where there is collusion between the debtors and the personal representative; or, where he is insolvent, and there is just apprehension of loss, if he is permitted to collect them; or, as is said by Chancellor KENT in *Long v. Magestre*, 1 Johns, Ch. 306, where there is some other special case not exactly defined." In *Marshall v. Gayle*, 58 Ala. 284, the bill was filed by distributees, as is this bill, to enforce a lien on lands for the payment of promissory notes given for the purchase-money, upon an averment that there was no personal representative, that there were no valid debts against the estate, that they were too poor to give the necessary bond for administration, and were not able to procure any person to take administration. The estate had been reported insolvent by an administrator in chief, who had resigned, and it was apparent there were claims against the decedent, the validity of which was disputed. It was said by MANNING, J., that "it is only by an administrator, who succeeds to the title which was in Mrs. Gayle at her death, that the business of an estate so involved can be conducted, its assets be gathered in, its debts be ascertained, and distribution be made."

There are exceptional cases, in the words of Ch. KENT, "special cases not exactly defined," in which this court, venturing beyond established precedents and decisions, has dispensed with the presence of a personal representative, and permitted the next of kin to sue, or distribution to be made to them directly. Many, if not all, of these cases are collected and referred to in *Fretwell v. McLemore*, 52 Ala. 124. In each of them there existed some special facts indicating clearly that there was no necessity for an administrator—that if administration was taken, the only duty resting upon an administrator would be to receive with one hand, and with the other make distribution; or without the intervention of an administration, the parties entitled, being adults, had made division of them. In several of the cases the decedents were persons not *sui juris*, infants, or

[Costephens et al. v. Dean et al.]

married women, their inability to contract adding strength to an averment that there were no creditors whose rights were endangered. In *Fretwell v. McLemore*, *supra*, the decedent was a citizen of Georgia, never having resided in this State, and *prima facie*, there were no creditors in this State, whose rights it was the duty of the court to protect. Another feature of these cases, distinguishing them from the present is, that the settlement of the estates, of which the decedent was one of the distributees, was the subject-matter, to which distribution was an incident, and it was decreed directly. In courts of law, wherever the legal title is necessary to support an action, the presence of a personal representative in whom it is vested, has been invariably required.—*Miller v. Eatman*, 11. Ala. 609.

All cases in which distribution of personal assets is permitted without an administration, or in which next of kin, or legatees are permitted in their names to sue directly for their recovery, are exceptional. There is a departure from the general principle, that the legal title to the estate resides exclusively in the personal representative, and he only can maintain suits for their recovery. In all such cases there is peril, more or less remote, in obeying the decree rendered in favor of the next of kin. For, if there should be subsequently a personal representative appointed, he would not be bound by the decree—it would not be evidence against him. The parties who had yielded to and obeyed the decree, would be compelled to double vexation, and possibly a double payment, unless they could protect themselves by proving the affirmative facts which authorized the recovery by the next of kin.—*Gardner v. Gantt*, *supra*. While we have no intention to depart from, or modify the former decisions on this question, we are unwilling to extend them to a case like the present, in which the decedent was an adult citizen of the State, and his next of kin seek, in their own name, to recover his personal estate upon the sole averment, that there are no debts against the estate; an averment which is supported only by the presumption sought to be deduced from the fact that a number of years have elapsed since his death, and administration has not been taken. There may be debts existing against him which do not fall within the bar of the statute of limitations, defaults as executor, or as administrator, or in some other fiduciary capacity, or debts payable on a contingency, the contingency not happening on which they are payable until a very recent period. He had the capacity to incur such debts, and it can not be affirmed with certainty that they do not exist. If they should exist, until by the lapse of time there would be a presumption of payment of the debts now preferred as owing the decedent, these appellees would be in peril of vexation of



[Bird v. Womack.]

suit, and of a legal recovery by a personal representative, against which a decree in the present suit, and performance of it could not protect them. The case is without the exceptional cases in this court, in which next of kin have been decreed distribution in the absence of a personal representative, or have been suffered to recover the personal assets in their own names. It is distinguishable from *Hanrick v. Walker*, 50 Ala. 34, in which, on final settlement, the personal representative had distributed to the sole next of kin, evidence of debt, upon which the latter was allowed to sue in his own name. The distribution invested him with the absolute title, legal and equitable.

There is yet another feature of the case, which would, in its present condition, be fatal to the plaintiffs' right of recovery. The widow of the intestate is entitled to share with them in the distribution of the assets, and she is not made a party in any capacity. The omission to make her a party defendant, which is her true relation, perhaps, in view of the peculiar facts of the case, is a special cause, of demurrer to the bill.

There are many questions of importance, and not without difficulty, touching the merits of the controversy, upon which an expression of opinion would be manifestly improper until they are presented by proper parties. There was no error of injury to the appellants in the decree dismissing the bill, and it must be affirmed.

## Bird v. Womack.

### *Action of Trespass de bonis asportatis.*

1. *Trespass de bonis asportatis*; mitigation of damages.—In trespass *de bonis asportatis*, if the defendant holds a mortgage or other lien on the property, he is entitled to have the amount secured thereby deducted by way of recoupment; or if the property has been returned to the plaintiff, this fact is available to the defendant in mitigation of damages.

2. *Same*.—But, if the defendant in such action, being a mere trespasser, has himself applied the property seized by him to the plaintiff's use, but without authority, and without the plaintiff's consent, express or implied, this fact is not available to him in mitigation of damages, although the use to which the property was applied, was the satisfaction of a lien which a third party held thereon.

3. *Same*.—In such case it can not be objected that the plaintiff is thus permitted to reap the benefit of double damages, as in trespass, exact compensation is not always the rule.

[Bird v. Womack.]

Tried before Hon. W. S. MUDD.

This was an action of trespass, brought by Ann M. Womack against William P. Bird, to recover damages for the alleged wrongful taking by him of certain cotton, corn and cotton seed in the complaint described, and was commenced on the 1st of April, 1869. The defendant pleaded not guilty, and on issue joined on this plea the cause was tried, and resulted in a verdict and judgment for the plaintiff.

The evidence introduced on behalf of the plaintiff tended to show the commission of the trespass by the defendant while he was acting as "special coroner," in levying an attachment issued from the Circuit Court of said county on the 17th December, 1868, in favor of Bell & Moore against the plaintiff and one Lowndes Womack, on the property sued for; and that "after the levy none of said property ever came to the possession, or went to the use or benefit of plaintiff." The value of the property was also proved. The defendant then produced a written instrument executed by the plaintiff and Lowndes Womack to Bell & Moore, dated February 28th, 1867, and, according to its terms and recitals, creating a lien in the nature of a mortgage on the cotton crop to be raised by the makers thereof on a tract of land known as the "Hay's Mount place," during that year, to secure \$1383.36, for money advanced to them by Bell & Moore, to enable them to make a crop; and "stated to the court that he expected to introduce evidence tending to show, that the corn and cotton levied on by him were raised by the plaintiff in 1867, on the Hay's Mount place; that the writ of attachment under which he levied on said corn and cotton, was sued out by said Bell & Moore to enforce the collection of the debt evidenced and secured by said writing; that said Bell of said firm was with him when he made said levy, and had agreed to indemnify him against loss or damage by reason of his levy on said corn and cotton under said writ; that the cotton levied on was all hauled to the gin of one Ridgeway, by whom it was ginned and packed; that said cotton ginned out about eight bales, weighing about five hundred pounds each, which were shipped to said Bell & Moore, and by them sold for about twenty-six cents per pound, and the proceeds applied by them as a credit on the debt evidenced and secured by said writing; and that plaintiff had never claimed said cotton, or its proceeds, from said Bell & Moore. And defendant then offered in evidence, in connection with said proposed testimony, said writing, for the purpose of (1) mitigating the damages claimed by plaintiff, and (2) of showing that the cotton had been disposed of, and applied in accordance with plaintiff's contract, and for her benefit, and that she had received the benefit of it. The plaintiff objected to the introduction of said writing, and the court

[Bird v. Womack.]

refused to allow it to be read in evidence in connection with the proposed testimony, for the purposes for which it was offered; and also refused to allow the evidence proposed in connection with the writing, to be introduced; and to each of these rulings of the court the defendant excepted."

The rulings of the Circuit Court above noted are here assigned as error.

E. MORGAN, for appellant.

CLARK & McQUEEN, and Wm. P. WEBB, *contra*.

SOMERVILLE, J.—Where, in an action of *trespass* or *trover*, the property sued for has been returned to the possession of the owner, this fact is available to the defendant in mitigation of damages, but not in bar of the action.—*Ewing v. Blount*, 20 Ala. 694; 2 Greenl. Ev. § 635.

So where the defendant, in his own right, holds a mortgage or other lien of any kind on the property, he is entitled to have the amount so secured deducted by way of recoupment.—*Sedgwick on Dam.* 6th Ed. p. 600 (\*482), and *note* (2). And it is also settled that where the property has been appropriated to the plaintiff's use by *his consent*, express or implied, this may be shown in mitigation of the damages otherwise recoverable. *Field on Dam.* § 785; 2 Greenl. Ev. § 635*a*. And while there is reputable authority for the doctrine that the defendant's consent is not necessary in such cases (*Irish v. Cloyes*, 8 Verm. R. 30), we think the better and sounder rule to be, that, without such consent, at least one that is *implied* in fact or law, it avails nothing to the mere trespasser that he has himself applied the goods illegally seized or converted to the owner's use in the absence of all authority. It has been held that such consent may be implied where the property has been seized in the hands of the trespasser and sold under legal process against the owner, and this is, perhaps, the correct principle.—*Squire v. Hollenbeck*, 9 Pick. 551; 2 Greenl. Ev. § 635*a*, *note* (5).

In *Higgins v. Whitney*, 24 Wend. 379, 381, it was said by BRONSON, J.: "One who has wrongfully taken property can not mitigate damages by showing that *he has himself* applied the property to the owner's use without his consent. But when the property has been so applied, by the *act of a third person and the operation of law*, that fact should be taken into the account in estimating the plaintiff's damages."

In *McMichael v. Mason*, 13 Penn. St. R. 215, where a sheriff was sued for wrongfully levying on and selling the plaintiff's goods, it was held that he could not be permitted to prove in mitigation of damages that he had applied the proceeds of sale



[Griffin v. Spence, Adm'r.]

to the payment of plaintiff's debt, due for freight on the goods and a *lien* on them. "The sheriff," say the court, "being a trespasser from the beginning, could gain no right from his wrong—not even a right to pay the plaintiff's debt without request." A similar ruling was declared by the Supreme Court of Pennsylvania in *Dallam v. Fidler*, 6 Watts & Serg. 323.

We believe these decisions not only to better harmonize with the reason of the law, but also to accord with principles supporting a sounder public policy. If defendants, generally, were permitted to invoke such a defense, they would be encouraged in pragmatistical interferences with the property of third persons, and, perhaps, to such an extent as frequently to endanger the public peace. It is carrying the rule sufficiently far to accord this right of recoupment to parties who hold liens on property, which is the subject of conversion or trespass, and we are not inclined to extend its operation further, despite the hardship of the principle in many cases. Hard cases, as has been aptly said, too frequently prove to be the quicksands of the law.

It can not be objected that the plaintiff is thus permitted to indirectly reap the benefit of double damages. In cases of trespass, exact compensation is not always the rule. In assessing damages, for example, whether to person or property, for an injury resulting from a defendant's negligent or wrongful act, it can not avail him any thing that the plaintiff has recovered compensation from an insurance company which had taken a risk against accident or fire upon the one or the other.—*Althorf v. Wolfe*, 22 N. Y. (8 Smith), 355; *Yates v. Whyte*, 4 Bing. (N. C.) 272; *Weber v. R. R. Co.*, 10 Amer. Rep. 253.

The Circuit Court did not err in refusing to admit in evidence the mortgage executed by appellant to Bell & Moore, and its judgment is affirmed.

## Griffin v. Spence, Adm'r.

*Bill in Equity to Revive and Carry into Execution a Former Decree.*

1. *Bill carrying into execution former decree ; when it will be entertained.* A court of equity will entertain a bill to carry into execution a decree it has pronounced, when it appears that from some neglect of the parties "to proceed upon the decree, their rights have been so embarrassed by subsequent events, that no ordinary process of the court upon the first decree will serve; and it is, therefore, necessary to have another decree of the court, to ascertain and enforce them."

[Griffin v. Spence, Adm'r.]

2. *Same ; when may be filed by party defendant to original suit.*—After the rendition of a decree, by which the rights of the parties are ascertained, both complainants and defendants being equally entitled to the benefit thereof, a defendant who has an interest in the execution of the decree, or who has rights involved which require a revivor, will be allowed to revive it by bill filed for that purpose.

3. *Same ; in what court should be filed.*—A bill to revive and enforce a decree, is auxillary and supplemental in its nature ; and, in order that the unity of the proceedings may not be destroyed, it must be filed in the court in which the decree was rendered.

4. *Same ; parties to original decree must be parties to.*—The parties to the original decree must, as a general rule, be parties to the bill to revive and enforce it ; and their presence can not be dispensed with, unless it appears that they can not execute the decree nor be the objects of its operation.

5. *Same ; rule as to parties.*—The general rule prevailing in a court of equity, that all persons having a material interest to be effected by the decree, must be made parties, applies to bills to revive and enforce a former decree, not only that a multiplicity of suits may be avoided, and complete justice done, but that there may be security in the performance of the decree, and the litigation closed, incapable of being re-opened by parties having interests in it, but who are not before the court.

6. *Same.*—W. and K. having been partners, died leaving their partnership affairs unsettled, and letters of administration were granted on their estates. By agreement between their administrators, T., the administrator of W., who died first, was to “control and wind up” the partnership business ; and in pursuance of that agreement he filed a bill in equity, and obtained a moneyed decree against C. on a demand due from the latter to the partnership. To the bill S. as the administrator of K. was made a party defendant, but against him no relief was sought or obtained. Afterwards T. died, having only collected half of the amount of the decree. *Held,*

(a) That the successor to T. in the administration of the estate of W. is a necessary party to a bill filed by S. as the administrator of K. to revive and execute the decree ; and that his presence as a party can not be dispensed with upon the averment that none had been appointed, and that in equity and right such successor would have no claim to the unpaid balance due on the decree, but that, he having collected half of the decree, such balance was the property of S. as the administrator of K., the complainant.

(b) That these are matters such successor has the right, and must have the opportunity of litigating, and they can not be finally determined in his absence.

#### APPEAL from Chambers Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on the 15th of July, 1881, by Samuel Spence, as the administrator of the estate of James W. Kellam, deceased, the appellee, against James M. Griffin, S. J. Costley and H. W. Finney, as the administrator *de bonis non* of the estate of Warrenton Costley, deceased, the appellants, for the purpose stated in the opinion. The material averments of the bill are substantially as follows: In 1859, James W. Kellam and Henry L. Wilkinson entered into a partnership for the purpose of engaging in a general mercantile business, and

[Griffin v. Spence, Adm'r.]

they continued in that business as partners until November, 1862, when Wilkinson died intestate. Soon thereafter Jno. C. Towles was appointed the administrator of his estate by the Probate Court of Chambers county. In December, 1863, James W. Kellam died intestate, and the complainant was appointed administrator of his estate by the same court. Afterwards complainant and Towles entered into an agreement, that the latter was to control and wind up the partnership business of the firm of Kellam & Wilkinson; and in pursuance of that agreement, Towles, as the administrator of the estate of Wilkinson, filed a bill of complaint "in what was then known as the 12th District of the Southern Chancery Division of the State of Alabama, against one Warrenton Costley, praying for an account between Costley and the firm of Kellam & Wilkinson." On the final hearing of the cause made by said bill, the court entered a decree in favor of Towles, as such administrator, and against Costley, adjudging that "said Warrenton Costley was indebted to the said firm of Kellam & Wilkinson in the sum of twenty-one hundred and seventy-seven 82-100 dollars," and ordering him to pay it to Towles within a time specified in the decree. From this decree Costley appealed to this court, executing a supersedeas bond therefor, with J. M. Griffin, S. J. Costley and one T. D. Ratchford as his sureties. On the hearing of the appeal, the decree of the Chancery Court was affirmed, and it was ordered and decreed by this court, that Towles, as such administrator, should recover of Warrenton Costley and the sureties on the supersedeas bond the full amount of said decree, together with interest, costs and damages. The bill then avers, that Spence, as the administrator of James W. Kellam, deceased, was made a party defendant "to said original bill, but that he was merely a nominal party, being made a party in order that he might concede the right to said John C. Towles, administrator of Wilkinson, to control and wind up the partnership business of said firm of Kellam & Wilkinson;" and that no relief was sought or obtained against him in that suit. The bill then charges, on information and belief, that Warrenton Costley paid to John C. Towles the half of the "amount of said decree which belonged to the estate of Henry L. Wilkinson, deceased, but claimed the right to retain in his own hands the amount which belonged to the estate of James W. Kellam, deceased, pretending, that he, the said Costley, had obtained letters of administration on the estate of James W. Kellam, deceased, and therefore had the right to the custody and control of the assets belonging to said estate. And that the said John C. Towles, conniving and colluding with the said Warrenton Costley" permitted him to keep and retain in his own hands the half of the amount of



[Griffin v. Spence, Adm'r.]

said decree, "which of right belongs to your orator, as the administrator of the estate of said James W. Kellam, deceased." It is further averred, that several executions had issued on said decree, the last of which was issued on 10th September, 1873; that since the issuance of the last execution John C. Towles had died, and that no successor to him in the administration of the estate of Henry L. Wilkinson had been appointed; that the said estate "has now no interest in said decree, the same having been paid off and discharged to the said John C. Towles, as such administrator, in his lifetime, that is to say, the one-half of the amount of said decree belonging to the estate of Henry L. Wilkinson, deceased, was paid to said John C. Towles in his lifetime, and the balance of the amount of said decree is now the exclusive property of the estate of James W. Kellam, deceased;" that Warrenton Costley was dead, and H. W. Finney was the administrator *de bonis non* of his estate; that the said 12th District of the Southern Chancery Division was at the time of the filing of said original bill, composed of the counties of Chambers and Lee; but that since that time changes have been made in the chancery divisions and districts of the State, and "that there is now no such district as the 12th District of the Southern Chancery Division of Alabama, composed of the counties of Chambers and Lee, that said counties have each a separate chancery court, that for Chambers being known as the 18th, and that for Lee as the 16th District of the Eastern Chancery Division of Alabama." It is further averred that all the parties having an interest in the cause resided in the county of Chambers; and that T. D. Ratchford was dead, and his estate was insolvent. It also appears from the bill, that said original cause, and the records and papers pertaining thereto, were in the Chancery Court of Lee county. The prayer of the bill is sufficiently stated in the opinion.

The appellants demurred to the bill on the grounds, (1) that the bill purported to be a bill of revivor of a decree rendered in favor of John C. Towles, as administrator of Henry L. Wilkinson, deceased, and it could only be revived in the name of the successor of Towles; (2) that the bill was an effort to revive a suit in a separate district from the one, in which the original cause was tried, and the decree rendered; and (3) that the complainant's only remedy was an original bill for the settlement of the partnership matters between the estates of Wilkinson and Kellam. They also moved to dismiss the bill for want of jurisdiction, and filed a plea to the jurisdiction of the court, alleging that the records and papers in the original cause were in the Chancery Court of Lee county, and insisting that the bill was filed in the wrong district. The appellees excepted and demurred to the plea; and the cause was submitted

[Griffin v. Spence, Adm'r.]

for decree on the demurrer, motion to dismiss, and the plea and the exceptions and demurrer thereto. The Chancery Court, on the hearing, entered a decree overruling appellant's demurrer, motion to dismiss and plea; and the errors here assigned are based on this decree.

W. H. BARNES, for appellant.

WATTS & SONS and DOWDELL & HOLMES, *contra*.

BRICKELL, C. J.—The purpose and prayer of the original bill is to revive and execute a decree of the court of chancery against Costley, as affirmed against him, and his sureties on the appeal bond, by the judgment of this court, which has become abated by the death of the complainant, in whose favor it was rendered, and also by the death of Costley, the original defendant. To the suit in which the decree was rendered, the present complainant was a party defendant, but, as is now averred, was a mere nominal party, that he might concede the right of Towles, in whose favor the decree was rendered, “to control and wind up the partnership business of Wilkinson and Kellam.” The further averment is made, that one-half only of the decree is unpaid, and that this, of right and in equity, is the property of the complainant, Spence.

A court of equity will entertain a bill to carry into execution a decree it has pronounced, when it appears that from some neglect of the parties “to proceed upon the decree, their rights have been so embarrassed by subsequent events, that no ordinary process of the court upon the first decree will serve; and it is, therefore, necessary to have another decree of the court, to ascertain and enforce them.”—2 Dan. Ch. Pr. 1585. The bill may be exhibited by one not a party, or deriving title under a party to the decree, if he has similar interests, and can not, without an execution of the decree, obtain a determination of his own rights. An instance of a bill of this description is *State v. Mayor*, 24 Ala. 701. A decree had been rendered for the abatement of a public nuisance, on a bill filed by the Attorney-General, in the name of the State. Citizens whose rights and interests were affected by the nuisance, and who were, therefore, concerned in its abatement, were permitted to intervene for the revivor and enforcement of the decree. And a decree which the complainant has suffered to abate, may be revived at the instance of a defendant, if the complainant or those standing in his right neglect to do it; “for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.”—2 Dan. Ch. Pr. 1539. When an abate-

[Griffin v. Spence, Adm'r.]

ment occurs before decree, the suit can be revived only by the complainant or those claiming under him; since no one can be compelled to commence, renew, or revive a suit against another. 2 Dan. Ch. Pr. 1539; *Griffith v. Bronaugh*, 1 Bland Ch. 547. After decree, when the rights of the parties are ascertained, if the defendant has an interest in the execution of the decree, or if he has rights involved which require a revivor, he will be allowed to revive it.—*Bensou v. Wolverton*, 1 C. E. Green (16 N. J. Eq.), 110; *Peer v. Cookerow*, 2 Beasley, (13 N. J. Eq.), 136. “The good sense of the rule is, when the defendant can derive a benefit from the further proceeding, he may revive, unless there is a general rule against it.”—*Williams v. Cooke*, 10 Vesey 406; *Griffith v. Bronaugh*, *supra*.

The bill must of necessity be filed in the court in which the decree was rendered. It has rather a dual nature—it is partly an original bill, and partly in the the nature of an original bill, though not strictly original.—Mitf. and Tyler's Eq. Pl. 194. Like a *scire facias* to revive a judgment at law, it has something of the form and characteristics of a new, and of the continuation of a former suit. In either case the *scire facias* at law, or the bill to revive and enforce the decree, must proceed in the court having the record on which it is founded. There is a case, 1 Atk. 408, referred to in the text books as supporting the proposition, that the bill will lie to carry into execution the judgment of an inferior court of equity, if the jurisdiction of that court is not equal to the purpose. All our courts of equity are of co-equal jurisdiction, each having like authority to revive and enforce its decrees. The decree was not rendered, is not of record, in the court in which the present bill was filed. It remains of record in the court rendering it, having full jurisdiction to revive and carry it into execution, whenever the jurisdiction is invoked by a proper party, and the ends of justice may require it. The whole purpose of a bill to revive and enforce a decree, is auxiliary and supplemental. It is the completion of the execution of the decree, and if the bill to revive and carry it into execution were entertained in any other court than that in which the decree was rendered, the unity of the proceedings would be destroyed.

The parties to the original decree must, as a general rule, be parties to the bill to revive and enforce it. Their presence can not be dispensed with, unless it appears that they can not execute the decree, nor be the objects of its operation.—2 Dan. Ch. Pr. 1540. The general rule prevailing in a court of equity applies to bills of this character, as to other bills for relief. All persons having a material interest to be affected by the decree must be made parties, not only that a multiplicity of suits may be avoided, and complete justice done, but that there may



[Griffin v. Spence, Adm'r.]

be security in the performance of the decree and the litigation closed, incapable of being re-opened by parties having interests in it, and who are not before the court.

The original decree was rendered in favor of Towles as administrator of Wilkinson, founded on a demand due from Costley, the defendant, to the partnership of Wilkinson and Kellam. In legal contemplation, the decree is assets, belonging to the estate of Wilkinson, the unpaid balance of which, on the death of Towles, was unadministered, vesting in title, not in his personal representative, but in his successor as administrator when appointed. The presence of the successor as a party to the bill it is sought to dispense with, upon the averment that none had been appointed, and that in equity and right, such successor would have no claim to the unpaid balance, because it is the exclusive property of the complainant. These are matters a successor to Towles must have the right and opportunity of litigating. Of them, in the absence of such successor, there can be no determination which will be final; and if a decree was rendered for the revivor and enforcement of the original decree, there would be much of insecurity in yielding obedience to it. A successor in the administration of Wilkinson's estate, whenever appointed, could not be denied the right to revive and enforce the decree, unless these matters were affirmatively shown in the defense. The decree rendered to which he was not a party, would not be evidence against him, the litigation now involved would be re-opened and upon the want of evidence which, it may be, could now be introduced, or upon the introduction of other and further evidence, a different determination reached, from that which would now be reached. That a successor in the administration has not been appointed, is not a reason or excuse for proceeding to a decree, which must affect, and ought to bind the personal assets. Any party having an interest in the appointment, can procure it from the court of probate, the court having authority to confer it on the general administrator or sheriff of the county, if no one having rights in the assets will accept it.—*Marshall v. Gayle*, 58 Ala. 284; *Costephens v. Dean*, ante p. 385. It is a fundamental principle of justice, that judicial tribunals must not pass upon and decide rights, unless the parties claiming them have the opportunity to appear and vindicate them. It is the general rule of a court of equity, that a defendant wishing to revive a suit after decree, must give notice to the plaintiff or his representative.—2 Dan. Ch. Pr. 1540. The only exceptions which can be engrafted on the rule are exceptions of the character already referred to, where the plaintiff has no further interest in the decree, and can not be the object of its operation. When this affirmatively appears on the record, notice to

[Jones v. Wilson, Adm'r.]

the plaintiff may not be necessary. Whenever it rests upon extrinsic evidence, and may be the matter of controversy, notice is indispensable.

It is insisted that though the bill may not be maintainable as a bill to revive and enforce the decree, it may be maintained as strictly an original bill, for the recovery of the balance due on the decree as a partnership debt, the right and title to which reside in Spence, as the personal representative of the last, surviving partner. If in any aspect the bill could be maintained upon that ground, it is obvious that it would still be fatally defective for the want of necessary parties. The original demand against Costley is merged in the decree, which is a new debt payable to, and demandable only by a successor to Towles, in whose favor it was rendered.—Freeman on Judgments, § 217. If there be any trust arising either from the agreement into which Towles and Spence entered, or because of the state of the partnership accounts, by which Spence would have the superior equity to the unpaid balance of the decree, the trust can not be declared and enforced unless there was a successor to Towles, having the legal title to the decree, before the court. But the bill is framed, and has appropriate allegations for no other purpose than the revivor and enforcement of the decree, and it is unnecessary to consider what rights, if any, the complainant would have, if another case were presented.

The demurrer and the motion to dismiss, and the plea to the jurisdiction, were improperly overruled, and the decree must be reversed and the cause remanded, that a decree sustaining them may be rendered.

## Jones v. Wilson, Adm'r.

*Bill in Equity by Creditor to have Deed to Lands declared Fraudulent and Void.*

1. *Fraudulent deed ; when it will not uphold claim of adverse possession.* Where a debtor executed a deed to lands for the purpose of placing the title beyond the reach of his creditors, and of creating a secret trust for his own benefit, he continuing in fact the real owner, and enjoying the use, products and profits of the estate, and the grantee never having been in possession of, and never having exercised or claimed any dominion or ownership over, the lands conveyed, the grantee is not, under such deed, clothed with any ownership or asserted right, which will uphold a claim of adverse possession against a creditor of the grantor, seeking to subject the lands conveyed by the deed to the payment of his debt.

2. *Fraudulent conveyance ; when sub-purchaser thereunder a necessary*  
VOL. LXIX.

[Jones v. Wilson, Adm'r.]

*party to bill filed by creditor to condemn lands conveyed thereby.*—A creditor seeking to have set aside as fraudulent and void a deed to lands executed by the debtor, and to have the lands sold for the payment of his debt, can not condemn and have sold a part of the lands, which a third party had purchased from the parties to the deed, and of which he had taken possession under his purchase, without making such purchaser a party to the bill, although it is not shown that the purchaser had paid for the lands, or that he had received a conveyance thereof.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The bill in this cause was filed by Jason G. Jones, the appellant, on the 10th of March, 1880, against Willis J. Wilson as the administrator of Thomas J. Orme, deceased, Jane C. Orme, the widow of said decedent, and Emily F. Sharpe and others, heirs at law of Josephus P. Sharpe, deceased, for the purpose of having set aside as fraudulent a deed to lands therein described, absolute on its face, reciting a moneyed consideration, which was executed by Thomas J. Orme to Josephus P. Sharpe. At the time the bill was filed the lands were in the possession of Jane C. Orme. The opinion states the case made by the record.

GUNTER & BLAKEY, for appellant.

R. M. WILLIAMSON, and J. N. ARRINGTON, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The present bill, filed by a creditor, seeks to set aside as fraudulent, a deed to lands, absolute on its face, made by Orme to Sharpe in 1867. The bill was filed in March, 1880. In 1859, Orme became general administrator of the county, and Jones, the complainant, became one of his sureties. As such surety he was sued on the administration bond, for a *devastavit* and default committed by Orme, his principal, and was forced to pay on said account, during the years 1877 and 1878, the sum of three thousand dollars, or more. Orme is dead, and his estate entirely insolvent. The tract of land, sought to be condemned in this suit, furnishes the only means for Jones' reimbursement. The defense set up by Sharpe's administrator and heirs is a plea of the statute of limitations of ten years since Sharpe became the owner of the land. The chancellor sustained the plea, and dismissed complainant's bill; not on the ground that Jones' claim against Orme was barred as a debt; but on the ground that Sharpe had had the continuous adverse possession of the lands under claim of right, for more than ten years, when this suit was brought. This, it is contended, and was so ruled by the chancellor, vests a good title in Sharpe's



[Jones v. Wilson, Adm'r.]

heirs, although his purchase and title were fraudulent in their inception. We consider it unnecessary to announce what would be our ruling, if it were shown that Sharpe and those claiming in his right, had been in open and notorious, or, what is the same thing, in independent, adverse possession of the lands, claiming ownership, for ten continuous years before this suit was brought. That is not this case. We have examined the testimony in this cause with great care, and our clear conviction is that there was no real sale from Orme to Sharpe. We think the purpose was to place the title beyond the reach of Orme's creditors, while Orme, all the while, was the real owner, entitled to and enjoying the use, products and profits of the estate. Sharpe never was in possession, never had or exercised dominion or ownership, and hence never held the property adversely to any one. It is manifest to us, that the whole purpose of the conveyance was to create a secret trust for the benefit of Orme, and that, in fact, Sharpe never intended to assert ownership of the property, adverse to the claims of Orme. Such secret trust does not clothe the trustee with any ownership or asserted right, which will uphold a claim of adverse possession.—*Cummings v. McCullough*, 5 Ala. 324; *Patterson v. Campbell*, 9 Ala. 933; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Huggins v. Perrine*, 30 Ala. 396; *Crawford v. Kirksey*, 55 Ala. 282; *Hubbard v. Allen*, 59 Ala. 283; *Sandlin v. Robbins*, 62 Ala. 477; *Sims v. Gaines*, 64 Ala. 392; *Humes, assignee, v. Davis*, at last term; Bump on Fraudulent Conveyances, 39, 212; 1 Amer. Leading Cases, (*Seaton v. Wheaton*), 49 et seq.

The bill in this case seeks to condemn a tract of land of something over eight hundred acres. As to part of the land, the testimony shows that about the year 1868 Sharpe, through Orme, sold a part of the tract to Hood, and Hood took possession under his purchase. It is not shown whether Hood paid for the land, or whether he received a conveyance. Hood was not made a party to this suit. To foreclose his rights, and condemn that part of the tract to sale in payment of Orme's debt, it was necessary to make him a party.—*Hunt v. Acre*, 28 Ala. 580; *Doe ex dem. v. McLoskey*, 1 Ala. 708; *Bryant v. Young*, 21 Ala. 264. Not having made Hood a party, that part of the tract which the proof shows he had purchased, can not be declared subject to complainant's claim. The lands purchased by Hood are the northeast quarter of the southeast quarter of section 1, township 13, range 18, and the northwest quarter of the southwest quarter of section 6, township 13, range 19—in Montgomery county, Alabama.

The decree of the chancellor is reversed, and a decree here rendered, declaring that the complainant is entitled to relief,

[Mayer &amp; Co. v. Taylor &amp; Co.]

and that the deed from Orme to Sharpe, exhibited in the pleadings, was made in secret trust for the benefit of Orme, and with intent to delay, hinder and defraud his creditors. And, with the exception of the lands sold to Hood, above described, said deed is set aside, annulled and vacated.

It is referred to the register to take and state an account of the amount due complainant, with interest thereon to the first day of the next term of the Chancery Court. All other questions are reserved for decree by the chancellor.

## Mayer & Co. v. Taylor & Co.

### *Action on the Case by Mortgagee of Unplanted Crops against Purchaser with Notice.*

1. *Mortgage of unplanted crop ; title conveyed thereby.*—It is the settled doctrine of this court, that a mortgage executed by the owner or lessee of land on a crop which is not planted, but is to be planted *in futuro*, conveys to the mortgagee, not the legal title, but merely an equitable interest or title.

2. *Same ; when lien attaches ; relation of the parties.*—The lien of such a mortgage attaches as soon as the crop comes into existence ; and the mortgagor, or his assignee with notice, becomes a trustee, holding the legal title for the benefit of the mortgagee.

3. *Mortgages on unplanted crops ; priority of lien.*—P. having leased land for farming purposes, in February, and before planting his crop, executed to T. & Co., a mortgage on the cotton crop to be raised on the land during the year by himself, or by his procurement, and soon thereafter, and before the crop was planted, formed an equal partnership with K. who had knowledge of the mortgage to T. & Co., for the cultivation of the land during that year. After the crop was planted the partnership executed a mortgage to M. & Co., they also having knowledge of the mortgage to T. & Co. on the cotton crop to be raised by them during that year on said land, to secure advances made to the firm to enable them to make the crop. A crop having been raised on the land by the partners, they delivered a part of the cotton, after it was gathered, to M & Co. *Held*, in an action on the case brought by T. & Co. for the recovery of damages for a conversion of the cotton ;

(a) That the interest which K. took, when the partnership was formed, in the crops to be grown, was subject to the equitable lien already created in favor of T. & Co.

(b) That the lien of the mortgage to T. & Co. was superior and paramount to the lien of the mortgage to M. & Co., on the whole crop of cotton raised by the partnership. (STONE, J., *dissenting, held*, that T. & Co. had a prior lien on P.'s half of the cotton, and only on that half.)

APPEAL from Greene Circuit Court.  
Tried before Hon. W. M. S. MUDD.

[Mayer &amp; Co. v. Taylor &amp; Co.]

This was an action on the case brought by Taylor & Co. against Mayer & Co. to recover damages for the alleged conversion by the defendants of six bales of cotton, on which the plaintiffs had an equitable mortgage, of which the defendants had notice. The complaint also contains a count in trover. The other pleadings are not set out in the record. The evidence introduced on the trial was substantially as follows: One W. W. Pendergrast, on or about the 1st January, 1880, rented a tract of land for the purpose of farming, and on 5th February, 1880, he executed to the plaintiffs a mortgage, by which he bargained, sold and conveyed to them "the crop of cotton which he might raise, or procure to be raised during the year 1880," on the rented lands, to secure advances made by them to enable him to make a crop. This mortgage was duly recorded on 18th February, 1880. A short time after the execution of this mortgage, Pendergrast and Mrs. D. A. Kelley entered into an agreement "to work the said lands in partnership, sharing the profits and losses equally." On the 14th May, 1880, said Kelley & Pendergrast executed to the defendants a mortgage on the cotton crop to be raised by them during that year on said rented lands, to secure the defendants for advances which they agreed to make to said firm during the year, and which they did make in pursuance of such agreement, to enable them to make a crop. The defendants, at the time of the execution of the mortgage to them, had actual notice of plaintiffs' mortgage, and were also informed of the partnership formed between Mrs. Kelley and Pendergrast, and the terms thereof. Mrs. Kelley and Pendergrast worked said lands during the year and raised thereon the six bales of cotton in controversy "under their partnership agreement," each furnishing the same amount of team and labor. At the time the agreement was entered into, "nothing had been done towards making said crop, except that about three acres of stubble land had been broken up, which had to be plowed over again." On 20th November, 1880, Mrs. Kelley and Pendergrast delivered to the defendants the six bales of cotton, in payment of the debt secured by the mortgage to them, and the defendants sold the cotton for \$229.00; but before the sale thereof the plaintiffs demanded of the defendants the cotton, and they refused to deliver it. It was also shown that Pendergrast owed the plaintiffs a balance on the debt secured by the mortgage executed to them, which was less than the amount for which the cotton was sold; and that the partnership of Kelley & Pendergrast owed one Smith about \$100, which was still due and unpaid.

The court, at the request of the plaintiff in writing, charged the jury "that if they believed the evidence they must find for the plaintiffs for the amount shown to be due on their said



[Mayer &amp; Co. v. Taylor &amp; Co.]

mortgage debt, with interest thereon since the same became due." To the giving of this charge the defendants excepted. The defendants asked the court in writing to charge the jury, "that the said Pendergrast was not prohibited by the mortgage to said Taylor & Co. from farming said lands in partnership with another, and that in this case the said Taylor & Co. were entitled under said mortgage only to the interest of said Pendergrast in said cotton, after the claims of Mrs. Kelley and the partnership creditors were satisfied; and that the plaintiffs, therefore, could not recover in this action." The court refused to charge the jury as requested by defendants, and they excepted. A judgment was rendered for the plaintiffs on verdict, and the defendants appealed.

The rulings of the Circuit Court above noted are here assigned as error.

HEAD & BUTLER, for appellants. (No brief came to the hands of the reporter.)

WM. P. WEBB, *contra*, cited 53 Ala. 432; 60 Ala. 537; 54 Ala. 670; 60 Ala. 214; *Collier v. Faulk & Martin*, *ante*, p. 58; *Rees v. Coats*, 65 Ala. 256; *Mayer v. Clark*, 40 Ala. 259; *Reese v. Bradford*, 13 Ala. 837.

SOMERVILLE, J.—The subject of mortgages on unplanted crops, not *in esse* at the time of the conveyance or assignment, has been the subject of much discussion, and the adjudged cases are greatly conflicting. Some of them hold that such a mortgage is *void*, and conveys no title to the crops, either legal or equitable.—*Hutchinson v. Ford*, 9 Bush (Ky.) 318; s. c. 15 Amer. Rep. 711; *Comstock v. Scales*, 7 Wis. 159. Others hold that they are *valid at law*, and good to convey a legal title.—*Arques v. Wasson*, 51 Cal. 620; s. c. 21 Amer. Rep. 718; *Robinson v. Ezzell*, 72 N. C. 231; Jones on Chat. Mortg. § 143. Neither of these extreme views, however, has been adopted by this court. Its doctrine in reference to this subject is now firmly settled, that a mortgage executed by the owner, or the lessee of land, on a crop which is not planted, but is to be planted *in futuro*, conveys to the mortgagee a mere *equitable* interest or title, which will not support an action of detinue, trover, or trespass.—*Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, *Ib.* 256; *Booker v. Jones*, 55 Ala. 266; *Abraham v. Carter*, 53 Ala. 8. This view, is, in our opinion, supported by the weight of authority.—*Moore v. Byrum*, 30 Amer. Rep. 58; [s. c. 10 S. Ca. 452.] NOTE, p. 63; *Fonville v. Casey*, 4 Amer. Dec. 559, NOTE, p. 560; *Sillers v. Lester*, 48 Miss. 513; and other cases cited in *Grant v. Steiner*, *supra*.

[Mayer &amp; Co. v. Taylor &amp; Co.]

The principle lying at the basis of these decisions is, that a thing having a *potential existence* may be mortgaged or hypothecated. By potential existence we understand a present interest in property, of which the thing sold or conveyed is the product, growth or increase, as opposed to a mere possibility or expectancy, not coupled with such an interest.—Benjamin on Sales, § 78; *Low v. Pew*, 108 Mass. 347. Hence an assignment of future wages, there being no existing contract of service, is invalid; but the assignment is good where there is such a contract of service.—*Mulhall v. Quinn*, 1 Gray, 105. It is commonly said that a man may sell the wool to be clipped from his sheep at a future time, or the milk his cows may yield in the coming month or year, and the sale is valid; but not so as to the wool of any sheep, or the milk of any cow which he may acquire at any time in the future, even though it be but the next hour.—Benjamin on Sales, § 78. The clear distinction is that in the latter cases, the subject of the contract is not *in rerum nature*, or, as is commonly said, *in esse*.

“Land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant.”—*Grantam v. Hawley*, Hobart Rep. 132. There can be no valid distinction between the wine a vineyard is expected to produce, and the grain or cotton a field is expected to grow, except as to the relative amount of skill and personal labor that may be expended in the two cases. Each is the product of property, owned *in presenti* by the vendor in the case of a sale.—Story on Sales, § 183. In *Andrew v. Newcomb*, 32 N. Y. 417, it was said: “In the case of crops to be sown it [the title] vests potentially from the time of the executory bargain, and actually as soon as the subject arises.” In other words, the lien attaches *eo instanti*, when the property comes into existence. They come into being together and co-exist, and equity executes the contract by holding that done which is agreed to be done. So soon as the crop, or other thing mortgaged exists, the vendor, or his assignee with notice, becomes a trustee holding the legal title for the benefit of the mortgagee. And whenever this equitable ownership, or interest, is once established, the courts will interpose for its protection.—*Sillers v. Lester*, 48 Miss. 513.

It is plain from these principles that the mortgage executed by Pendergrast to the appellees, Taylor & Co., on February 5, 1880, conveyed to the latter an equitable title or interest in all the crops raised during the current year, on the lands, by the mortgagor or “by his procurement.”

The question presented is, whether he can be permitted, before the planting of the crops and after making this conveyance, to assign an interest in them to a third person, to the prej-

[Mayer &amp; Co. v. Taylor &amp; Co.]

notice of the lien already created in favor of the first mortgagees. The evidence shows that soon after making the mortgage to Taylor & Co., Pendergrast formed a co-partnership with a Mrs. Kelley for the cultivation of the lands of which he was then in possession, and on which the six bales of cotton in controversy were grown, and that the two contributed work and labor jointly, under the agreement that the profits in the business were to be equally divided between them as partners, carrying on the farming business under the firm name and style of Kelley & Pendergrast. The partnership mortgaged the property on May 14, 1880, to the appellants, Mayer & Co., and delivered the cotton to them the following fall, they having notice of the prior mortgage to Taylor & Co. The contention is between the lien of the two mortgages.

Our opinion is that, under this state of facts, the interest taken by Mrs. Kelley in the crops to be grown, was taken subject to the equitable lien already created, and of which she had notice. The contribution made to the partnership by Pendergrast was the land with its potential capacity for future products, and his teams and personal services. These were already subject to the operation of an agreement creating an equity against them. When the products or crops came *in esse*, the mortgagor was to hold the legal title as trustee for the first mortgagees. The interest assigned to the partner, who was let in, was an undivided half interest as tenant in common of every thing produced. The assignee, Kelley, could acquire no greater interest than the assignor had, and must therefore have taken it *cum onere*. *Nemo plus juris ad alium transferre potest, quam ipse habet.* (Coke Litt. 309, b.) As between the conflicting liens of the two mortgages, we see no reason which rescues them from the operation of the maxim, that "he who is first in time is stronger in right." The mortgage given to the defendants, Mayer & Co., being taken with full notice of the mortgage previously executed to plaintiffs was subordinate to it, and the court ruled correctly in so charging.

The judgment is affirmed.

STONE, J., *dissenting*.—I differ with the majority of the court in this case.

Pendergrast had rented lands for the year 1880, on which he proposed to make a crop. On the 5th of February, 1880, he executed a mortgage to C. H. Taylor & Co., and therein conveyed to them "the crop of cotton which he might raise or procure to be raised" on said rented land during that year, to secure payment to them for a horse and other things advanced to him to make a crop. The mortgage was recorded in the proper probate office, February 18, 1880. It is common knowl-



[Mayer &amp; Co. v. Taylor &amp; Co.]

edge that crops of cotton are not planted in this State until after February 5th. Under our rulings this was a valid mortgage (the cotton then having a potential existence), and bound the crop afterwards planted and grown, to the extent expressed in the mortgage. The difference between such a mortgage, and one which conveys chattels which have an actual existence, is in the character of the title it confers. The former creates a mere lien, or equity; the latter a legal title. This changes the remedy, but, in other respects, does not impair the right. In each event, the mortgage-interest will prevail over rights or liens afterwards acquired, with actual or constructive knowledge of the prior mortgage.—*Booker v. Jones*, 55 Ala. 266; *Rees v. Coats*, 65 Ala. 256; *Grant v. Steiner*, 65 Ala. 499.

After the execution of the mortgage described above, but before the crop was planted, Pendergrast formed a partnership with Mrs. Kelley in the lease of said land, and in the crop to be grown thereon; and the crop was made by means and labor furnished by each—a son of Mrs. Kelley laboring for her. This partnership was to be equal in profits and losses; and each furnished the same amount of team and labor.

On the 14th of May, 1880, the firm or partnership of Kelley & Pendergrast executed a mortgage on their crop, to defendants, Mayer & Co., to secure them for advances the latter merchants made to the firm, to enable them to make the crop. The present contention is over the cotton grown by said firm of Kelley & Pendergrast on said rented land. The Circuit Court ruled that Taylor & Co., the mortgagees of Pendergrast, had a paramount lien on the whole crop grown, over Mayer & Co., the mortgagees of the partnership; and my brothers have affirmed the judgment of the Circuit Court.

My own judgment is, that Taylor & Co. have a prior lien on Pendergrast's half of the cotton, and only on that half. This lien, I think, is paramount to that of Mrs. Kelley, the co-partner, and to that of Mayer & Co., the mortgagees of the firm. In the absence of prior liens, and of stipulations to the contrary, each partner has a lien on the partnership effects for any balance that may be due him, for excess of disbursements by him, and for the liquidation of partnership liabilities. But this lien has its inception in the formation of the partnership. It can not override former liens, created by the individual before he entered into the partnership. Coming in with a lien upon it, that encumbrance remains upon the share of assets the encumbrancer brings into the firm, until it is discharged; and the lien the co-partner acquires in the formation of the partnership, is subordinated to this prior lien, if there was notice, actual or constructive, of its existence. All would admit this to be the rule, if the stock put in and made common by the formation of the

[Griffin v. Appleby.]

partnership, consisted of chattels having an actual existence. The fact that the stock put in has only a potential existence, can not vary this question. It is alike subject to mortgage, and a proper registration of such mortgage gives notice of its existence, having the same legal effect as if the subject of it were property having actual existence at the time of the mortgage. So, if the question were material, I would hold that Mrs. Kelley, forming the partnership with constructive notice that Pendergrast had previously mortgaged the crop to be grown by him, must be understood as agreeing that the prior mortgage shall dominate the lien she would otherwise acquire as a partner.

How does this question affect the parties to this suit? The mortgage to Taylor & Co. was of the crop of cotton which Pendergrast might raise, or cause to be raised. The meaning of this language evidently is, that he conveyed the cotton that should be raised *by* him and *for* him on that land. It can not mean more. He might surrender, forfeit, or sell his lease. He might dispose of a part of it. In the one case he would raise or procure to be raised nothing; in the other, only a partial crop. Suppose he had sublet a separated part of the land to Mrs. Kelley. Could Taylor & Co. claim a lien on the crop then raised by Mrs. Kelley? Can the fact that Pendergrast sublet to her an individual half interest, or a common interest in the lease, instead of a separate interest, make any difference? He could not, and did not dispose of her earnings. It was the crop *he* might raise or procure to be raised, which he mortgaged. He neither raised, nor procured to be raised Mrs. Kelley's share of the crop. Consequently Taylor & Co. acquired no interest in it under Pendergrast's mortgage. They took the mortgage with all these risks, and, in my judgment, have a lien on Pendergrast's half. Mayer & Co. should have the other half, under their mortgage from Kelley and Pendergrast.

### Griffin v. Appleby.

*Attachment issued by, and returnable before Notary Public, with Jurisdiction of Justice of the Peace.*

1. *Notary public, with jurisdiction of justice of the peace.*—The grant of jurisdiction to notaries public appointed by the Governor, to "have and exercise the same jurisdiction as justices of the peace," by the constitution of 1875, (Art. vi, § 26), is as plenary, within their respective precincts and wards, as is the grant to justices of the peace; and whatever is given by statute to render the constitutional jurisdiction of the

## [Griffin v. Appleby.]

latter effectual—whatever of process they may employ in the exercise of the jurisdiction granted to them, such notaries public take and may employ, although they are not mentioned *eo nomine* in the statute.

2. *Same; can issue attachment returnable before himself.*—Notaries public appointed to have and exercise such jurisdiction, can issue attachments returnable before themselves, to enforce the collection of debts, not exceeding in amount one hundred dollars.

3. *Same; jurisdiction distinguished from powers.*—There may be, by the statutes, grants of powers to justices of the peace, not affecting their jurisdiction, which the constitution does not confer on notaries public having and exercising only the *jurisdiction* of justices of the peace.

## APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

On 31st October, 1881, J. M. and G. L. Griffin sued out two attachments against J. K. Appleby, a non-resident, which were issued by, and returnable before S. P. Green, a notary public appointed by the Governor, with the jurisdiction of a justice of the peace. The attachments were issued to enforce the collection of two debts, each less in amount than one hundred dollars, and were levied by service of writs of garnishment on E. G. Richards, as debtor to the defendant. The defendant and garnishee appeared before the notary in both cases, and objected to the notary's jurisdiction, the defendant moving to dismiss the attachments and to "quash the proceedings" had thereon, and the garnishee moving to dismiss the garnishments issued and served on him. The notary overruled these motions and rendered judgment in each case against the defendant, and also against the garnishee on his answers. The garnishee appealed in each case to the Circuit Court, and there renewed his motions to dismiss. The defendant also appeared and renewed his motions to dismiss the attachments and quash the proceedings had thereon. The Circuit Court quashed the garnishments issued in both cases, and the plaintiffs excepted, and from the judgment rendered in each case they appealed to this court. Both cases were here tried together, and the error assigned in each case is the ruling of the Circuit Court above noted.

ROBINSON & DENSON, for appellant.

E. G. RICHARDS, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The Constitution, Art. vi, § 26, declares, "justices of the peace shall have jurisdiction in all civil cases, whenever the amount in controversy does not exceed one hundred dollars, except in cases of libel, slander, assault and bat-



[Griffin v. Appleby.]

tery, and ejectment." The right of appeal without the prepayment of costs, it requires, shall be secured by law. The same section of the constitution provides: "That the Governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, shall have and exercise the same jurisdiction as justices of the peace within the precincts and wards for which they are respectively appointed."

The Code, § 3682, confers on justices of the peace exclusive power to issue attachments returnable before themselves, when the amount claimed does not exceed one hundred dollars, in two classes of cases: *First*, to enforce the collection of a debt, whether due or not at the time the attachment is sued out; *second*, to recover damages for the breach of a contract, where the damages are uncertain or unliquidated. The single question presented in these cases is, whether a notary public appointed by the Governor, having, and authorized to exercise the jurisdiction of a justice of the peace, can issue an attachment returnable before himself as justice of the peace, to enforce the collection of a debt, not exceeding in amount one hundred dollars.

The constitution of 1865 enlarged the jurisdiction of justices of the peace in civil cases, increasing the amount from fifty to one hundred dollars. The enlargement was followed by a statute enacted February 20th, 1866, forming part of § 3285 of the Revised Code, increasing the amount from fifty to one hundred dollars, for which they could in the specified cases issue attachments returnable before themselves. The constitution of 1868, Article 6, § 13, first conferred on notaries public the jurisdiction of justices of the peace, in terms more general than are employed in the present constitution. The clause of that constitution was, "that notaries public appointed according to law shall be authorized and required to exercise throughout their respective counties, all the powers and jurisdiction of justices of the peace."

The constitution is to be read and construed in connection with, and in the light of the existing laws, and when to these it refers, if it is not so read and interpreted, its real meaning can not be ascertained and effect can not be given to the intent of its framers, and of the people in its adoption. There can be no question that the grant of jurisdiction to notaries public, appointed by the Governor, to have and exercise it, is as plenary as the grant of jurisdiction to justices of the peace. The grant of jurisdiction to the one is not distinguishable from the grant to the other—within the precinct or ward for which he is appointed, the notary is, according to the words of the consti-

[Griffin v. Appleby.]

tution, "to have and exercise the same jurisdiction as justices of the peace." The mode in which the justice of the peace should exercise the jurisdiction conferred upon him, or the process he should employ to render the jurisdiction effectual, the constitution does not prescribe. That is left to legislative regulation, and, prior to the adoption of the constitution, had been the subject of legislation, and a system established, remaining of full force, because not repugnant to, or inconsistent with the provisions of the constitution. The statutes prescribing the mode in which the jurisdiction shall be exercised, and the process which shall be employed, refer in words only to justices of the peace, because enacted and existing prior to the constitutional grant of the same jurisdiction to notaries public. But these statutes open and take in the notaries public appointed to have and exercise the jurisdiction of justices of the peace. Otherwise, in the absence of legislation incorporating into these statutes the words *notaries public*, the grant of jurisdiction by the constitution would be barren—its energy and vitality dependent upon the legislative will. The constitutional grant is plenary, and whatever is necessary to make it effectual must be supplied by the common law, and by the statutes pertaining to the subject-matter. There may be by the statutes grants of *powers* to justices of the peace—powers not affecting their jurisdiction, which could be revoked without affecting or impairing the jurisdiction they are appointed to exercise, which the constitution does not confer on notaries public having and exercising only the jurisdiction of justices of the peace. But whatever is given by statute to render the constitutional jurisdiction of the justice of the peace effectual—whatever of process he may employ in the exercise of the jurisdiction, the notary having the same jurisdiction takes and may employ, though not mentioned *eo nomine* in the statutes.

The rulings of the Circuit Court are inconsistent with this view, and the judgments must be reversed and the cause remanded.

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

## Montgomery Mutual Building and Loan Association v. Robinson.

*Bill in Equity to enjoin Sale under Power in a Mortgage, and for an Account and Redemption.*

1. *Constitutional provisions; rule of construction.*—In the construction of constitutional provisions prescribing rules of legislative procedure, the observance of which is essential to the validity of legislative enactments, the courts keep steadily in view the purposes of their adoption, and avoid a closeness of construction which would tend to embarrass legislation.

2. *Second clause of second section of fourth article of constitution of 1865, construed.*—The second clause of the second section of the fourth article of the constitution of 1865, providing that “each law shall embrace but one subject, which shall be described in the title,” was not directed against the generality and comprehensiveness of titles to legislative enactments; but against combining several projects or subjects, having no proper relation to each other, in one bill, of which the title gave no intimation.

3. *Same; the act incorporating The Montgomery Mutual Building and Loan Association, not violative of.*—The act of the General Assembly entitled “An act to incorporate ‘The Montgomery Mutual Building and Loan Association,’” approved February 11th, 1867 (Pam. Acts, 1866–7, p. 408), had but one subject, which the title with clearness indicates, though it may not indicate the objects the corporation is designed to accomplish, or the powers with which it is to be invested, or the agency to be employed, or the mode to be pursued in exercising the powers. These are incidents necessarily pertaining to corporate existence—parts of the general subject expressed in the title. This act did not, therefore, offend such constitutional provision.

4. *Usury; a transaction sanctioned by the General Assembly can not be usurious.*—The General Assembly ordained the statute against usury, and its power to designate the transactions which shall be deemed offensive to, or which shall be excepted from the influence of the statute, can not be questioned. When that body lends express sanction to a particular transaction, that transaction is withdrawn, and excepted from the operation of the statute.

5. *Same; when transaction not usurious.*—Where, by act of the General Assembly incorporating a building and loan association, authority was given to expose to sale, at each monthly meeting of the association, the amount paid into the treasury, at public outcry to the highest bidder among the members, each of whom was authorized, for each and every share of stock held by him, to purchase an advance of two hundred dollars and no more; and the stockholder purchasing such loan or advance, was thereby required to allow the premium at which he bid in such advance or loan, to be deducted, and to give his note for the amount of such advance, and to pay, in addition to the monthly dues required from all members, one dollar and thirty-three and one-third cents per month for each share of stock, or at the rate of eight per cent. *per*



[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

*annum*, on the whole amount, including the premium,—such a transaction, having legislative sanction, is free from usury.

6. *Building and loan association; provisions of charter construed.*—Under a provision in the charter of a building and loan association, enacted by the General Assembly, that, in the event of the death of a stockholder, who had obtained an advance, his heirs or legal representatives were entitled to continue the relation of stockholder, the death of a member operates a dissolution of his membership, terminating his connection with the association; and upon his heirs or devisees, and not upon his personal representative, is conferred the privilege of succeeding to, or continuing the membership. And if such privilege is exercised by the heirs or devisees, they become members, not in a representative capacity, but in their own right; and they are subject individually to the duties and liabilities of membership.

7. *Same.*—Where the charter of such association further provides that, if the heirs or devisees were unable or unwilling to continue the membership of a deceased stockholder, who had obtained a loan or advance, the association is required to act as if default had occurred while the stockholder was living, and it also provides that a stockholder may redeem his property mortgaged to secure such loan or advance, by payment of such a sum of money as would, at the rate of premium at which the corporate funds were selling at the time of redemption, produce the same monthly interest as that which the stockholder had been paying on the advance, in no event being less than the net sum advanced,—the association can not neglect or delay indefinitely the foreclosure of the mortgage, and thus suffer dues, interest and fines to accumulate, increasing the mortgage debt and burdening the equity of redemption; but it must proceed to a foreclosure of the mortgage.

8. *Same.*—In such case, the liability of the mortgaged premises is the same amount that could have been demanded of the decedent, if, at the instant of his death, he had offered to redeem.

### APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

On the 20th July, 1869, John Lawler, at that time holding and owning ten shares of the stock of The Montgomery Mutual Building and Loan Association, a corporation created by a special act of the General Assembly, purchased, under the provisions of the charter of the association, an advance or loan of \$2,000 on his ten shares, for which he gave his note, and executed a mortgage on real estate in the city of Montgomery securing the same, with power of sale. The amount of money which he actually received on the advance or loan, was \$915, the balance being the premium offered by him, which was deducted from the loan. Lawler died in October, 1870, at which time he was not in default to the association, and after his death payments were made to the association by his personal representative, which were applied to dues and monthly interest on the theory that Lawler's membership still continued. Lawler's estate was insolvent, and was so declared by the probate court having the jurisdiction thereof; and William T. Hatchett was appointed the administrator of said estate. Said association having advertised the property conveyed by the mortgage for sale under the power contained therein, Patrick Robinson, as a

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

judgment creditor of said estate, filed the original bill in this cause, on 21st February, 1874, against the association, and said administrator, charging that said loan was usurious, that payments had been made thereon which had been applied by the association to illegal charges, and that the association was claiming more than was due, and seeking an injunction, an account of the amount due to the association on such loan, a sale of the property conveyed by the mortgage under the decree of the court, and an application of the proceeds, after paying whatever balance that might be due to the association under the mortgage to the payment of Lawler's debts. Hatchett, as administrator, answered the bill, admitting its allegations to be true; and afterwards filed a cross bill, making the same case, and seeking substantially the same relief, as was made and sought in the original bill. The association demurred to both the original and cross bills, and its demurrers having been overruled, it answered, denying the usury and the other averments of the bills, upon which the equities thereof rested. On final hearing, had upon pleadings and proof, the Chancery Court declared the loan usurious, ordered an account of the balance due, directed the application of payments, and decreed a sale of the property conveyed by the mortgage, and the proceeds, after the payment of the balance due on the loan, to be paid over to the complainant in the cross bill. From this decree the association and Hatchett, as administrator, appealed; and by agreement of parties, under the rule, errors were assigned by both parties on the same record. The statement in the opinion of facts and of the questions submitted for decision, renders it unnecessary to set out the assignments of error, or to state more in detail the case presented by the record.

DAVID CLOPTON, for appellant.

SAYRE & GRAVES, *contra*.

BRICKELL, C. J.—By agreement, the parties have waived all other than three of the questions the assignment of errors is supposed to involve. These questions are thus stated in the agreement: 1. Whether there was usury in the transaction between John Lawler and the Building and Loan Association, out of which the note and mortgage arose, *having been made in accordance with the constitution of the association*. 2. Upon what principles, and in what way, must the amount legally due upon the mortgage be ascertained. 3. The constitutionality of the act of incorporation, and if unconstitutional, what effect it has upon the transaction.

The association was incorporated by a special act of the Gen-

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

eral Assembly, approved February 11th, 1867 (Pamph. Acts, 1866-7, pp. 408-16), entitled "An act to incorporate The Montgomery Mutual Building and Loan Association." The first section, nominating particular persons, declares they are created a body corporate and politic, by the name of "The Montgomery Mutual Building and Loan Association," and by that name could sue and be sued, contract and be contracted with, acquire, hold and convey real estate or other property, make rules, regulations and by-laws, not inconsistent with the constitutions and laws of the United States or of this State, and to do any act necessary to carry into effect the constitution of the association, which is embodied in the act. The constitution consists of eleven articles declaratory of the objects of the association, defining the rights and liabilities of its members, providing specially for the management, loan or investment of the corporate funds, and prescribing the number, duties and powers of its officers. The second, third and fourth sections relate to the opening of the books for subscription to stock, the allotment of shares, and the election of officers.

This enactment, it is insisted, offends the second clause of the second section of the fourth article of the constitution of 1865, of force at the time of its passage by the General Assembly, which declared: "Each law shall embrace but one subject, which shall be described in the title." The objection resolves itself into two inquiries—is the subject of the act single, and described in the title; and does the act in its provisions conform to the single subject expressed or described. The clause of the constitution of 1865, under consideration, was borrowed literally from the constitution of 1861, when for the first time it made its appearance in the fundamental law of the State. In phraseology it differs from the present constitution, and from that of 1868, declaring: "Each law shall *contain* but one subject, which shall be *clearly expressed in its title*." The difference in phraseology has not caused any change or difference of construction; each clause being deemed significant of the same purposes and objects, and each having the same operation. In the construction of this and similar constitutional provisions, prescribing rules of legislative procedure, the observance of which is essential to the validity of legislative enactments, the courts have kept steadily in view the purposes of their adoption, and have avoided a closeness of construction tending to embarrass legislation. It has been often said in this court, repeating the words of other courts, that this clause of the constitution is intended to accomplish but one purpose, the suppression of a practice which had been too prevalent, leading at times to unfortunate, if not corrupt legislation, by which several projects or subjects, having no proper relation to each other, were combined in one



[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

bill, and the supporters of each *assisted* in passing all into law; or, clauses were inserted, of which the title gave no intimation; and the prevention of the deception of the legislature, and the people, by concealing under alluring titles legislation which, if its real character had been disclosed, would have been condemned. "There was no design by this clause," say the Supreme Court of Michigan, "to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design, when required to pass upon it."

*People v. Mahaney*, 13 Mich. 481. It is not directed against the generality or comprehensiveness of the titles to legislative enactments. In *Ex parte Pollard*, 40 Ala. 99, where the construction and operation of the clause was first drawn under the consideration of this court, said Chief-Justice WALKER: "The evil contemplated was not the generality and comprehensiveness of titles. These faults do not tend to mislead or deceive. . . . The particular subject selected by the legislature, and put in the title, must embrace every part of the law. The question must always be, whether, taking from the title the subject, we can find any thing in the bill which can not be referred to that subject. If we do, the law embraces a subject not described in the title. But this conclusion should never be attained, except by argument characterized by liberality of construction and freedom from all nice verbal criticism." No statute having but one general object, reasonably and fairly indicated by its title, has been condemned because of the generality of the terms of the title. Whatever provisions that have, by fair intendment, a necessary or proper connection with the subject expressed in the title, may be introduced into the body of the enactment. When the generality of the title is not made a cover for legislation incongruous to, or diverse from, the subject expressed, the spirit and purposes of the constitution are satisfied.—Cooley, Cons. Lim. 172-78.

The title of this enactment describes as its subject the incorporation, the formation of a body politic, having the name and style of "The Montgomery Mutual Building and Loan Association." The subject is single—the title with clearness indicates it, though it may not indicate the objects the incorporation, the body politic, is designed to accomplish, nor the powers with which it is to be invested, nor the agency to be employed, nor the mode to be pursued in exercising the powers. These are incidents of necessity pertaining to corporate exis-

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

tence—parts of the general subject expressed in the title.—*Sun Mutual Ins. Co. v. Mayor*, 4 Selden, 247; *Brewster v. City of Syracuse*, 19 N. Y. 116. It is not intended that the body of a legislative enactment shall be a repetition of the title, nor that the title shall be a summary or epitome of the body. The expression in the title, as is expressed in this title, of the actual subject to which the body of the act is devoted, is all that is required. The objection urged to this enactment is very far-reaching, and, if sustained, would sentence to nullity innumerable legislative enactments. When the creation of private corporations rested within legislative province, they were invariably created by special statutes, having titles, declaring the subject to be an incorporation of a particular name and style. Many such enactments, having such titles, were passed at the same session of the General Assembly, at which this statute was passed. These, though corporate existence under them has been established, corporate powers exercised, property and rights acquired, liabilities incurred, and for fifteen years their validity unquestioned, if the objection now urged were sustained, would be blotted from the statute book. The degree of particularity which must be observed in the expression of the subject in the title of a legislative enactment, must rest largely in legislative discretion. The duty of the General Assembly is met, when the title draws attention directly to the subject. Building and loan associations or societies have existed so long, their organization as corporations under general laws, or special legislative enactments, has been so frequent, that it may well be doubted, whether a more appropriate title could be selected for a special enactment of incorporation, a title more expressive of the subject of the enactment, than the title given to this statute. The idea at once suggested is, that the purpose of the corporation will be the accumulation of funds for division among the members, the investment of such funds until the appointed period of division, and enabling its members to obtain by anticipation, on such terms as may be prescribed, the proportion to which on division it is contemplated they will be entitled to receive. This is the subject of the present enactment, and all the provisions introduced into it, relate immediately to this subject.

The eighth article of the constitution entitles each stockholder, for each and every share of stock he may hold in the association, to purchase an advance of stock of two hundred dollars, and no more. The mode of obtaining the advance is prescribed. At each monthly meeting of the association, the amount paid into the treasury was to be exposed to sale at public outcry to the highest bidder among the members. The stockholder taking the advance allowed the premium he had

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

offered to be deducted, giving a note for the advance, secured by mortgage on real estate, equal in value to the net sum advanced, with power of sale; assigning also as collateral security, one share of stock in the association for each two hundred dollars of the advance. He was required to pay, in addition to the monthly dues required from all members, one dollar and thirty-three and one-third cents for each share of the stock, or at the rate of eight per cent. *per annum* on the whole amount, including the premium. If he failed in the payment of this monthly interest, he was subject to the same fines thereon, as for a default in the payment of other dues, which was ten cents per month for every dollar remaining unpaid, the fines continuing every month of the default. If for three successive months there was a neglect to pay any or all dues to the association, a foreclosure of the mortgage was authorized. From the proceeds of the sale of the mortgaged property, the association was authorized to retain and apply so much of the purchase-money as would be required to redeem the property under the provisions of the ninth article, and all payments, moneys and expenses due the association, the monthly fines continuing until the sale of the property. The provisions of the ninth article as to redemption were, that it should be had by the payment of such a sum of money, as would at the rate of premium at which the corporate funds were selling at the time of redemption, produce the same monthly interest as that which the stockholder had been paying on the advance, in no event being less than the net sum advanced. In the event of the death of the stockholder, who had obtained an advance, his heirs or legal representatives were entitled to continue the relation of stockholder. But if they were unable or unwilling to do this, the directors were required to act as if default had occurred while the stockholder was living.

The transaction which this article delineates, is that which is common to associations of this character; and when the association is merely voluntary, or is endowed with corporate capacity, not having special authority to enter into such a transaction, its legal efficacy is a question upon which the authorities are conflicting. It is apparent, the manifest purpose of the enactment was to authorize and legalize the transaction—to relieve it from the uncertainty in which it would have been involved, if it was without express legislative sanction. In the absence of such sanction, we could not hesitate to pronounce the transaction usurious; and that the mortgage was valid and operated as a security only for the sum of money actually advanced, or loaned, the lawful interest thereon, and such payments of taxes or insurance on the property, or other proper expenses of its conservation, as the association had actually paid;



[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

and that all payments made by or for the mortgagor, except his contributions as a member of the association, should be applied first to the reimbursement of such expenses, then to keeping down the interest; and when these expenses were satisfied, the interest extinguished, if a surplus remained, it should be applied to the reduction of the principal.—*Mobile Mut. B. & L. Ass. v. Robertson*, 65 Ala. 382; *Smith v. Garth*, 32 Ala. 368; *Mut. Sav. Bank & Build. Ass. v. Wilcox*, 24 Conn. 147; *Kupfert v. Guttenburg Build. Ass.*, 30 Penn. St. 465; *Link v. Germantown Build. Ass.*, 89 Penn. St. 15; *Mills v. Salisbury B. & L. Ass.*, 75 N. C. 292; *Herbert v. Kenton Build. & Sav. Ass.*, 11 Bush (Ky.) 296; *Columbia Build. & Loan Ass. v. Bollinger*, 12 Rich. Eq. (S. C.) 124. The General Assembly ordained the statute against usury, and its power to designate the transactions which shall be deemed offensive to, or which shall be excepted from the influence of the statute is not questioned. When it lends express sanction to a particular transaction, from the operation of the statute that transaction is withdrawn and excepted.—*Bibb County Loan Ass. v. Richards*, 21 Ga. 592; *Mut. Sav. Bank & Build. Ass. v. Wilcox*, *supra*; *Franklin Build. Ass. v. Marsh* 29 N. J. Law, 225; *Clarkeville B. & L. Ass. v. Stephens*, 26 N. J. Eq. 351; *Hagerman v. Ohio Build. & Sav. Ass.*, 25 Ohio St. 186; *Hekelnkämper v. German Build. & Sav. Ass.*, 22 Kansas, 549.

The intestate, Lawler, having on the 20th July, 1869, obtained an advance of two thousand dollars, less the premium, on ten shares of stock held and owned by him in the association, for which he gave his promissory note, secured by mortgage on real estate, the transaction conforming to the terms of the 8th article of the constitution, died in October, 1870. At the time of his death he was not in default to the association; and after his death, for some time, his personal representative made payments to the association, which were applied to dues and monthly interest, as if the membership in the association was continuing. It was not until January or February, 1874, that the association took any steps for the foreclosure of the mortgage, and during the whole period intervening after Lawler's death, dues, including monthly interest and fines for non-payment, are claimed. The question arising on this state of facts is, what sum, or sums can be claimed by the association on the redemption of the mortgaged premises.

The act of incorporation intends that the death of a member shall operate a dissolution of his membership, terminating his connection with the association. Upon his heirs or his legal representatives there is conferred the privilege of succeeding to, or in the words of the constitution, continuing the membership. If the privilege is exercised, they

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

become members, not in a representative capacity, but in their own right; and are subject individually to the duties and liabilities of membership. If the member dying has not obtained an advance upon his stock within four months after his death, his heirs or legal representatives could assert the privilege of succeeding to, or continuing the membership by the payment of all dues, fines, and arrearages which had accrued. But if within that period, they do not assert the privilege, and make the payment, the association becomes bound to refund, not to the heirs or legal representatives, but to the *personal representative* on demand, the amount the deceased had paid upon his stock, with eight per cent. interest thereon, deducting charges for fines, arrearages, and the proportion of the losses and expenses of the association the stock ought to bear. It is scarcely necessary to say, that the personal representative only can receive this sum and acquit the association of liability on it. Or if the deceased member had been advanced upon his stock, his heirs or legal representatives may succeed to, and continue the membership, *the proper change of name being first made in the security papers*. If they are unable or unwilling to effect this change, the board of directors are required to act as if it were the case of a living shareholder, who, for three successive months, had failed to pay dues to the association. The privilege of continuing the membership is conferred only on heirs or legal representatives, not on the *personal representative*, the executor or the administrator. Such privilege could not well be conferred on the personal representative, limited in authority and duty, and not having capacity to make or continue contracts charging the assets in his hands for administration—certainly not hazardous or speculative contracts which may not yield profit, and may involve a loss of the assets the law devotes to particular uses and purposes.

The nature, purpose, incidents and liabilities of membership in the association, exclude the hypothesis that an executor or administrator, unless it be an executor having authority by the will of the testator, can employ the assets in his hands for administration, in the continuance of membership in the association. These assets are devoted by law, primarily to the payment of debts, and after the payment of debts, to distribution to the next of kin in cases of intestacy, or if there be a will, to distribution as it may appoint. The line of the duty and authority of the personal representative is distinctly marked, and it corresponds precisely to the accomplishment of these purposes. The object of the association, expressed in the first article of the constitution, is, "the accumulation of a fund by the monthly subscriptions or savings of the members thereof to assist them in procuring for themselves such real estate as they

[Montgomery Mutual Building and Loan Assoc. v. Robinson.]

may deem desirable." There is no power in a personal representative, in the absence of express testamentary provision, to employ the assets either in investments or for accumulation. An inseparable incident for membership is the right to anticipate stock by obtaining an advance thereon. Such advance can not be obtained unless security by a mortgage of real estate is furnished the association. Borrowing money is not a power or duty of a personal representative, and to the real estate of his intestate or testator he has no title which could be conveyed by mortgage. When the clause of the constitution referring to the continuance of membership, in the event of the death of a member who has taken an advance on stock, is read, it seems self-evident, that it is the heir, or the devisee only, who is invested with the privilege of continuing the membership. The continuance can be obtained only by *the proper change of name being first made in the security papers*. The change—a proper change—could be effected only by the heir or devisee, succeeding to the estate of the deceased ancestor in the lands mortgaged as security, and not by the personal representative, having no estate in them.

The death of Lawler terminated his membership in the association and relieved him from all liability to pay dues of any kind to it. That liability is an incident of membership, and the two must co-exist. The sum which must be paid to redeem the premises from the mortgage is very clearly pointed out by the constitution. It is not the nominal sum for which the promissory note is given; nor is it the sum of money which was actually loaned or advanced to Lawler, though in no event, can it be less than that sum. It is the sum of money, which, at the rate of premium at which the funds of the association were selling at the time of his death, would produce the same monthly rate or payment of interest he had been paying on the loan or advance. This saves to the association all the benefits which would accrue if death had not intervened terminating the membership and the contract. A different rule would be applied, if Lawler had lived, falling into default in the payment of dues to the association. Such default visited with fines can not occur, when death terminates the membership. If the heir or devisee in whom resides the estate in the mortgaged premises, does not elect to exercise the privilege of continuing or succeeding to the membership—if he does not cause the proper change to be made *in the security papers*, by which they become his contracts, ceasing to be the contracts of the ancestor, the association must proceed to a foreclosure of the mortgage. The foreclosure can not be neglected, or indefinitely delayed, and dues, monthly interest and fines suffered to accumulate, increasing the mortgage debt, burdening the



[Kight v. Luke.]

equity of redemption. The liability of the mortgaged premises, according to the constitution of the association is the sum of money which at the rate of premium the funds of the association were selling at the time of Lawler's death, would produce the same monthly payment of interest, as that which he had been previously paying on the advance, not to be less in any event than the net amount he actually received. This is all which could have been demanded of him, if at the instant of his death he had come to redeem, there being no default in the payment of any dues; and it is the extent of the demand which may rightfully be made of his creditor, or of his personal representative, coming in to redeem after his death. To this sum must be added any payment of taxes or of insurance which the association may have made. The re-inbursement of such payments, made for the conservation of the mortgage estate, is an undoubted equity of a mortgagee.

The result is, the decree of the chancellor must be reversed, and a decree will be here rendered in accordance with this opinion.

## Kight v. Luke.

### *Bill in Equity to Enforce Specific Performance of a Contract for the Conveyance of Land.*

1. *Specific performance; indebtedness on other accounts no defense.* Specific performance of a contract can not be resisted, by showing that the complainant is indebted to the defendant on other accounts, which are not connected with the contract, of which specific performance is sought.

2. *Specific performance of contract for conveyance of land; what debts may be set up in defense of.*—L. purchased of B. a tract of land situate in this State for \$5000, and gave his notes for the purchase-money, B. executing a bond to make title on payment of the notes. L. then sold and conveyed to B. a tract of land situate in Georgia for \$2000, and this sum was by agreement applied to the payment for the lands which B. had sold to L. At the time of this last sale K. held a mortgage on the Georgia lands, executed to him by L. to secure \$500 and accrued interest; and afterwards K. acquired another claim against L. for \$100, and also became the owner of the notes which L. had given to B. for the Alabama lands, on which was entered the credit of \$2000. Before K. had acquired these notes, he had made an agreement with L. to purchase from him two parcels of the lands sold by B. to L. at an agreed price for each. The three parties, B., L. and K., then came together, and L. executed his note to K. for \$700, payable in cotton, in consideration of the \$500 note secured by mortgage on the Georgia lands, and of the other debt of \$100 which K. had acquired; and thereupon, by agreement between the parties, B. conveyed the lands which L. had purchased from him to K., and

[Kight v. Luke.]

K. went into possession of the two parcels which he had purchased from L. and the latter retained possession of the balance. In a bill filed by L. against K., it is averred that the price of the two parcels which the latter had purchased from the former, should be credited on the balance due on the purchase-money notes given to B., then held by K., and that B. had executed the deed to K. on the agreed condition that when L. had paid such balance, K. was to convey all the lands to L. except the two parcels purchased by him from L. The bill also avers the payment of such balance, and prays a specific performance of the contract to convey. In answer to the bill K. averred that the deed was made to him by B., not only to vest title in him to the two parcels which he had purchased from L., but also as security for the balance due on the purchase-money notes given by L. to B. then held by him, and for the payment of the said \$700 note, payable in cotton; and that no part of said debts had been paid. He further averred that he had not credited on the purchase-money notes the amounts he had agreed to pay for the two parcels purchased from L. because of certain damages alleged to have been sustained by him by reason of misrepresentations made by L. to him touching the location of, and number of acres contained in, one of the parcels so purchased by him. The cause having been heard on bill and answer, the chancellor caused to be entered a decree of reference, directing the register to confine the evidence and the account to the inquiry of what was due and unpaid on the purchase-money notes given by L. to B. *Held,*

(a) That the chancellor erred in thus confining the evidence and account.

(b) That, if the averments contained in the answer be true, the note for \$700 was not an outside or independent transaction, but was so connected with the contract for the conveyance of the land, that the complainant will be required to pay it before he can coerce specific performance.

(c) That if the defendant can prove the misrepresentations in reference to the quality and boundaries of the land purchased by him from the complainant, as alleged in his answer, then, to the extent he was injured thereby, he would have the right to have the price agreed to be paid therefor abated, and thus increase the balance due on the purchase-money notes given by the complainant to B.

(d) That if the averments of the answer be true, the complainant can obtain no relief without amending his bill, so as to correspond with the facts.

APPEAL from Randolph Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by William Luke, the appellee, against Henry J. Kight, the appellant, to enforce the specific performance of an alleged agreement to convey lands, and to enjoin two actions at law which had been commenced by the appellant against the appellee, in the Circuit Court of Randolph county, one for the recovery of the lands in controversy, and the other for the recovery of an alleged balance due on certain promissory notes given by the appellee for the purchase-money for said lands, and then held and owned by the appellant. The case made by the record is stated in the opinion.

SMITH & SMITH, for appellant.

JOHN T. HEFLIN, *contra*.

[Kight v. Luke.]

(No briefs came to the hands of the reporter.)

STONE, J.—The object of the present bill is to obtain specific performance of an agreement alleged to have been made in October, 1872, concerning real estate, situated partly in Randolph, and partly in Cleburne county. The bill was filed by Luke, the appellee. It sets up that, in October, 1871, Luke contracted with one Buchanan to purchase from him a pretty large tract of land, at the agreed price of five thousand dollars, payable in two installments, due severally December 25, 1871, and 1872, and gave Buchanan his notes for the purchase-money. Buchanan gave Luke a bond to make title to the land when the purchase-money was paid, and surrendered the possession to him. Luke sold to Buchanan a tract of land he owned, situated in Heard county, Georgia, at the agreed price of two thousand dollars, and he, Buchanan, went into possession thereof under the purchase. It was agreed that this should be part payment of the purchase Luke had made of Buchanan, thus paying two thousand dollars of the five thousand agreed to be paid. This sum was entered as a credit on Luke's notes to Buchanan. At the time this sale of the Georgia land was made by Luke to Buchanan, he, Luke, owed Kight, the appellant, five hundred dollars, with some accrued interest; to secure which, the latter held a mortgage on Luke's Georgia lands, so sold to Buchanan. This land was subsequently sold by Buchanan to Shackleford, to the latter of whom Luke was also indebted in a sum not exceeding one hundred dollars. This latter claim also became the property of Kight, either by purchase, or by payment at Luke's request; and, together with the note for five hundred dollars and accrued interest, made the sum of seven hundred dollars Luke owed Kight on that account. At this stage of the transactions between the several parties, Kight sold to Buchanan his lands in Georgia, and became the owner of the land-purchase notes given by Luke to Buchanan, on which there was a credit of two thousand dollars for Luke's Georgia land sold to Buchanan, and possibly another credit. Before that time, Luke and Kight had come to an agreement, by which Luke agreed to sell to Kight, and the latter to purchase, two parcels of the land the former had purchased of Buchanan; one parcel called the White Oak Bend place, at the agreed price of two thousand dollars; the other parcel known as the Tindall place, the price not then agreed on. The three parties, Buchanan, Luke and Kight, then came together—Luke executed his note to Kight for seven hundred dollars payable in cotton, in consideration of the five hundred dollar note, and accrued interest, secured by mortgage, as described above, and the debt of near one hundred dollars due from Luke to Shackleford, which had been purchased or paid



[Kight v. Luke.]

by Kight. Thereupon, by agreement between Luke and Kight, Buchanan conveyed to Kight all the lands which Luke had contracted to purchase from him—the Alabama lands referred to above. Up to this point the parties Luke and Kight are agreed.

The complainant, Luke, in his bill, charges that the deed was made to Kight upon the following agreed conditions: that the White Oak Bend place and the Tindall place were to remain the property of Kight—the former at the agreed price of two thousand dollars, and the latter at a price not agreed on, but Luke claims five hundred dollars for it. These sums, he avers, were to be applied as credits on the purchase-money notes given to Buchanan, then held by Kight; and that when he, Luke, completed full payment to Kight of the Buchanan purchase-money notes, then Kight was to convey by deed to Luke all the lands purchased by Buchanan, except the White Oak Bend and Tindall places, which were to be retained by Kight. That pursuant to this agreement Kight took possession, and has ever since occupied the White Oak Bend and Tindall places, and Luke has occupied the balance of the tract. That he, Luke, has made payments to Kight, and has thus paid the balance due on the Buchanan notes; and if he is mistaken, and if anything remains unpaid, he offers in his bill to pay the same. The bill sets forth other facts which, if true, and if the foregoing is a full and correct statement of the trust and agreement, authorized the filing of this bill, and the grant of the injunction, restraining the several suits Kight was prosecuting. This is substantially the case made by the bill.

The answer of the defendant makes a different case. He agrees to all that is stated above, with the following exceptions: He avers that the conditions and terms under which he and Luke agreed that the title to all the lands which Luke had purchased from Buchanan should be put in him, Kight, were, that in this way title should be secured and vested in him to the lands known as the White Oak Bend place, at the price of two thousand dollars, and to the Tindall place at the agreed price of two hundred dollars; and that these sums should be credited on the purchase-money notes, given by Luke to Buchanan, then held by Kight. Further, that Kight should hold the title to the other lands as security for the unpaid balance of the purchase-money notes, and also for the payment of the seven hundred dollar note payable in cotton, described above; and he averred that Luke has paid no part of said debts, but that the whole balance remained due. He admitted that he had not credited the two thousand dollars for the White Oak Bend place on the Buchanan notes, and gave as a reason therefor the following, which he averred to be the facts: That when he agreed to purchase the White Oak Bend place, and, until after the deed

[Kight v. Luke.]

was made by Buchanan to him, he had no knowledge of the quantity or boundaries of the tract he thus agreed to purchase, that he trusted to Luke for a correct representation of the same, that Luke represented the tract contained four hundred and sixty acres, showed him where he said the lines run, and pointed out to him certain valuable lands, which he represented as being within the said tract. He further averred that the White Oak Bend place contained in fact only three hundred and forty-four acres., that the lines did not run where Luke had pointed them out, that a large body of valuable land which Luke had thus represented to him as lying within the tract, was not embraced in it, and that he, Kight, had thereby sustained damage, the amount of which he averred. This he claimed should be deducted from the two thousand dollars, for which he had agreed to allow Luke credit on the Buchanan notes. The foregoing are the main points of issue, made by the pleadings.

When the cause was submitted to the chancellor for decree, there was an omission of a note of the testimony. He, however, made a decretal order, and referred it to the register to take testimony, and report an account between the parties. This decretal order was made on the pleadings, without regard to the testimony which had been taken. In the decretal order, the chancellor, among other things, said: "It is a fundamental rule that a specific performance of a contract can not be resisted by the defendant, by showing that the complainant owes him on account of other matters not connected with the contract of purchase. So also, a complainant, seeking a specific performance of a contract, can not have relief for matters not embraced in the contract. . . . Past or present indebtedness of either party to the other, not embraced in the contract sought to be enforced, must be treated as outside of the contract, and irrelevant matter. It is, therefore, ordered and decreed, and it is hereby referred to the register, to ascertain and report the amount, if any, yet due and payable to the respondent by the complainant, on the purchase-money notes given by the complainant to the respondent's assignor or transferrer, after allowing all proper and legal credits thereon, as understood and agreed upon between the parties to the contract referred to, and sought to be enforced in the bill of complaint."

It is unquestionably true that specific performance can not be resisted, by showing that the complainant is indebted to the defendant on other accounts, not connected with the contract, of which the bill prays specific performance. *Byrd v. Odem*, 9 Ala. 755; *Pulliam v. Owen*, 25 Ala. 492; *Sims v. McEwen*, 27 Ala. 184. But, do the pleadings in this record make a case for the application of that principle?

The contract which the present bill seeks to have specifically

[Kight v. Luke.]

performed, is not the contract of sale made by Buchanan to Luke. That was the origin of the transaction, and was a necessary part of the somewhat complicated dealings, out of which this contention arose. The contract, however, which gave rise to the present suit, was that made between Luke and Kight, under which the deed from Buchanan was made to Kight, conveying all the lands. Kight in his answer, as we have seen, avers that by the terms of that agreement, the title of the lands was placed in him, and was to remain in him, as security, not only for the payment of the Buchanan notes, but of the seven hundred dollar cotton note as well. The parties were competent to make such a contract as this, and if they made it, it then ceased to be an outside or independent transaction. And, indeed, so far as it was a renewal of the five hundred dollar note Luke had previously given Kight, secured by a mortgage on the lands in Georgia, which Luke conveyed to Buchanan in part payment of the Alabama lands, it was not entirely an independent transaction. That land had been received by Buchanan as payment of two thousand of the five thousand dollars Luke had promised him for the Alabama lands. It was encumbered by mortgage to Kight, to secure a debt of five hundred dollars, with accrued interest. If Kight had enforced his mortgage against the lands, it would have carved that sum out of their value, and, consequently, would have subtracted that much from the two thousand dollar payment Luke had made to Buchanan, by conveying the lands to him. This would have increased to that extent the unpaid purchase-money Luke owed to Buchanan. But aside from this, if Luke, when the agreement was made to place the title in Kight, stipulated that the latter should hold the title as security for both debts, and until they were paid, then the cotton note ceased to be an outside, or independent transaction, and Luke would be required to pay the cotton note as well, before he could coerce specific performance. The chancellor erred in directing the register to confine the evidence and the account to the inquiry of what was due and unpaid on the purchase-money notes given by Luke to Buchanan. Of course, we do not affirm that Kight will be able to prove the contract as he avers it was made. But, he should have been allowed to make the attempt.

So, if Kight can prove the alleged misrepresentation of the quantity and boundaries of the White Oak Bend place, charged to have been made by Luke, then, to the extent he was injured by the misrepresentation, he has the right to have the alleged payment of two thousand dollars, made in that tract of land, abated, and thus show a larger balance due on the Buchanan notes. Of course, to entitle himself to this abatement, his proof must conform to the rules governing such defense.—*Kelly v.*



[Garrett v. Garrett.]

*Allen*, 34 Ala. 663. It should be remarked, however, that in the form in which this question is here presented, the insolvency *vel non* of Mr. Luke, is not a material inquiry.

What is said above is based on the pleadings, without reference to the testimony. It is scarcely necessary to add, that if Mr. Kight's version of the agreement under which the title was made to him, be the true one, the complainant can obtain no relief without amending his bill, so as to correspond with the facts.—1 Brick. Dig. 692, § 768; *Ib.* 694, § 798; *Ib.* 694, § 802.

Reversed and remanded.

## Garrett v. Garrett.

### *Petition for Citation to Guardian to make Final Settlement of his Guardianship.*

1. *Rule of repose of twenty years ; to what debts applicable.*—The rule of repose, which, by common consent of the courts, has been fixed at a period of twenty years, has been declared applicable to all kinds of debts and pecuniary obligations, including fiduciary demands in favor of *cestuis que trust* against trustees; and the reason of the rule applies with as much force and propriety to guardians as to other trustees.

2. *Same ; when it begins to run in favor of guardians—quere.*—It is a question of gravest difficulty as to the time when the rule begins to run in favor of guardians; and while the question is not decided in this case, the court incline to the opinion that it begins to run from the last item on the guardian's account, or the last partial settlement, or other clear recognition of the guardianship as a subsisting and undischarged trust, and not from the time when the ward becomes of age.

3. *Guardian and ward ; when ward's right to a settlement not barred.* Where, on the petition of the ward, the guardian was cited to make a final settlement of his guardianship within less than twenty years from the date of the last partial settlement made by him, and also within less than twenty years from the date when the ward became of full age, the right of the ward to a settlement by the guardian is not barred by the rule of repose.

4. *Same ; when statute of limitations begin to run.*—As between guardian and ward, the statute of limitations does not ordinarily commence to run until there has been a termination of the guardianship.

APPEAL from DeKalb Probate Court.

Tried before Hon. JOHN N. FRANKLIN.

The proceedings in this cause were commenced by a petition filed by M. B. Garrett, praying that a citation be issued to Sarah Garrett, as the guardian of petitioner, requiring her to appear and file her accounts and vouchers for a final settlement of her guardianship. The petition was filed on 16th June, 1881, and

[Garrett v. Garrett.]

its averments show, that Sarah Garrett was appointed guardian of the petitioner by said court in 1854, and, in 1856 and 1857, she, as such guardian, received certain moneys belonging to the petitioner; that she had never made a final settlement of her guardianship, but that on the 28th February, 1862, she made a partial settlement thereof. The petition, as amended, also shows that the petitioner attained his majority in June, 1863. On 1st July, 1881, the guardian appeared in obedience to the citation, produced her accounts for a final settlement of her guardianship, and proposed to file the same; but A. B. Green, one of her sureties, having been allowed to come in and defend against the petition, demurred thereto on the grounds, in substance, (1) that the petitioner's claim had become stale, and no recovery could be had thereon, and (2) that it was barred by the statute of limitations. The Probate Court entered a decree sustaining the demurrer and dismissing the petition; and that decree is here assigned as error.

L. A. DOBBS and SAM'L F. RICE, for appellant.

WATTS & SONS, *contra*.

SOMERVILLE, J.—It has been repeatedly decided by this court that after the lapse of *twenty years* from the time when an executor or administrator may be coerced to a final settlement, the presumption of settlement and payment arises in his favor, and operates as a positive bar to any proceeding citing him to a settlement, unless there has been a recognition or admission, within that period, of the administration, as a continuing, subsisting, and undischarged trust.—*Greenlees, Adm'r v. Greenlees*, 62 Ala. 330; *Harrison v. Heflin*, 54 Ala. 552, and authorities cited.

This rule of presumptive evidence, based on the doctrine of prescription, has been well pronounced to be "rule of convenience and policy, the result of a necessary regard to the peace and security of society."—*Foulk v. Brown*, 2 Watts, 209. As suggested by this court, in *McArthur v. Carrie's Adm'r*, 32 Ala. 75, the reasons are forcible why it should be applied to all human transactions which are open to judicial investigation, and the rule by common consent of the courts has been fixed at a period of twenty years. It has been declared applicable to all kinds of debts and pecuniary obligations, including judgments, bonds and mortgages, embracing also fiduciary debts of every character due from trustees to *cestuis que trust*. The reason of the rule applies, therefore, with as much force and propriety to guardians as to other trustees.

So sweeping is the principle in its scope and operation, that  
VOL. LXIX.

[Garrett v. Garrett.]

the presumption raised by it is not arrested or rebutted by the proof of any disability, such as *infancy* or *coverture*, on the part of the distributees by whom a trustee or administrator has been cited to settlement.—*McCartney's Adm'r v. Bone*, 40 Ala. 533. Nor is the period of the late war between the States, during which the statutes of limitations were suspended, to be deducted in its computation, as held by this court in *Harrison v. Heflin*, 54 Ala. 552. The decisions are numerous in support of the foregoing propositions.—*Goodwyn v. Baldwin*, 59 Ala. 127; *Rhodes v. Turner*, 21 Ala. 210; *Barnett v. Tarance*, 23 Ala. 463; *Harvey v. Thorpe*, 28 Ala. 250; *Gantt's Adm'r v. Phillips*, 23 Ala. 275; *McArthur v. Carrie's Adm'r*, 32 Ala. 75.

As between guardian and ward, statutes of limitation do not ordinarily commence to run until there has been a termination of the guardianship. This event may happen not only in the event of the ward's arriving at the age of twenty-one years, but also where either the death, resignation or removal of the guardian has intervened. Upon the happening of either of these contingencies the ward has the lawful right to coerce a settlement.—Code of 1876, §§ 2768–69, 2791, 2664; *Alston v. Alston*, 34 Ala. 16; *Chapman v. Chapman*, 32 Ala. 106.

It is a question of gravest difficulty as to the time when the period of twenty years shall commence to run. Shall it be only when the ward becomes of age, thus allowing a possible period of over forty years to transpire in many cases, before the settlement of the trust can be presumed, as would happen when the guardian qualifies when a minor is but six months old? Or can it safely be allowed to commence from the last item on the guardian's account, the last partial settlement, or other like recognition of the existing trust? We confess that we can see objections to the establishment of either rule, but are inclined to adopt the latter as being less fraught with evil results, and as being more readily justified on principle. Section 2771 of the present Code provides that every guardian must make a settlement of his accounts every three years, and prior to the amendatory act of February 15th, 1873, *annual* settlements were required of him.—Code of 1867, § 2421; Code of 1852, § 2022. So it is further provided by section 2791 of the Code of 1876, that "if the guardian does not come forward once in every three years and make settlement of his accounts, it is *the duty of the judge of probate* to cause a citation to be served on him to appear and make settlement, and upon his *refusal or neglect to make such settlement*, it is *the duty of the court to remove him from office*, unless good cause be shown for the omission." The same duty was exacted of judges of probate by the Codes of 1852 and 1867, excepting



[Garrett v. Garrett.]

that he was required to cite the guardian to annual settlements.—Code of 1867, § 2440; Code of 1852, § 2030.

The judges of the probate court have thus been constituted *quasi* official trustees in this matter to represent the interests of minors. The presumption is that every sworn officer of the government will perform his official duties, and in proper cases it must be presumed that these officers will not neglect one so mandatory in its nature as that imposed by this statute. It would certainly be no unreasonable presumption to assume that they had not continuously neglected it for a period of twenty successive years. The probability is rather that the duty has been performed, and upon the refusal or neglect of the guardian to make settlement he has been removed, and the relationship of the guardian and ward has thus, or otherwise, terminated. When the presumption of payment and settlement, based on the lapse of twenty years, is thrown into the scales, the preponderance must be, we think, rather in favor of its prevailing over the countervailing and opposite presumption. There is room here for fit application of the maxim, *Interest reipublicae ut sit finis litium*—it is to the interest of the State that there should be some limit to litigation.

We are inclined to adopt the rule, therefore, that if a period of twenty years be permitted to elapse from the last item on the guardian's account, or the last partial settlement, or other clear recognition of the guardianship, as a subsisting and undischarged trust, the claim of the ward is stale, and he is barred of his right to coerce the guardian to a settlement. This point, however, is not absolutely necessary to be decided for the purposes of this case, and we leave it undetermined at present.

In this case the last partial settlement was made by the guardian on February 28th, 1862, and the citation of the guardian to settlement, made by the judge of probate, was issued within less than twenty years from the date of such partial settlement—being within a little over nineteen years from the last recognition of the trust. It was also within less than twenty years from the ward's attaining his majority. Estimating then from either period of time, the bar of twenty years is not complete.

Whether the amount found due by the guardian on final settlement, if anything, is barred by the statute of limitations as against the surety on the guardian's bond, is a question which can not be here considered, as it does not properly arise in the case.—Code, 1876, § 3226, subd. 7.

The petition filed by the ward to bring the guardian to settlement was improperly dismissed. The decree of the probate court must be reversed and the cause remanded.

## Williams v. Bowden.

### *Contest of Exemptions.*

1. *Judgment for statutory penalty; no exemptions against.*—As against a judgment rendered for the recovery of the penalty given by statute against a mortgagee for failure to enter satisfaction of the mortgage upon the margin of the record, after its payment (Code of 1876, § 2223), there is no constitutional or statutory exemption in this State.

APPEAL from Pike Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

M. J. Bowden and J. E. Parish, the appellees, having obtained a judgment against S. A. Williams and D. Williams, the appellants, for two hundred dollars, for a failure on their part to enter satisfaction upon the margin of the record of a mortgage, being the penalty prescribed by section 2223 of the Code of 1876, caused an execution to be issued thereon on the 29th of November, 1880, which was levied on the respective homesteads of the appellants. They having separately claimed their homesteads as exempt, the execution was duly returned, showing this fact; and thereupon, the appellants having made the necessary affidavits for a contest of the exemptions so claimed, an issue was made up and tried in each case. The Circuit Court held that the homesteads were not exempt from levy and sale under the execution issued on said judgment, and so charged the jury, in substance, and the appellants excepted. There was a verdict in each case in favor of the appellees on which judgments were rendered condemning the homesteads to sale for the satisfaction of appellees' judgments. From these judgments separate appeals were taken to this court. The ruling of the Circuit Court above noted is here assigned as error in both cases.

N. W. GRIFFIN, and M. N. CARLISLE, for appellants.

JOHN D. GARDNER, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The judgment, which is the foundation of the proceedings in these cases, was rendered on a penalty, and not on a "debt contracted." Our constitutional provision, and stat-

[Comer v. Daniel.]

utory exemption, do not embrace such a claim as this.—*Meredith v. Holmes*, 68 Ala. 190; Thompson on Homestead, §§ 380 to 383; Code of 1876, § 2820.

Affirmed.

## Comer v. Daniel.

*Action on the Case for Conversion of Personal Property covered by Lien.*

1. *Lien for advances; when statute not complied with.*—The written note or obligation required by the statute to be executed for advances (Code of 1876, § 3286), is vitiated as a statutory crop lien, by including therein, knowingly and intentionally, a debt which was contracted for a separate and distinct purpose, and which constitutes a material portion of the consideration. (STONE, J., *dissenting*.)

APPEAL from Bullock Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was an action on the case brought by the appellee against J. F. Comer and another, the appellants, for the purpose of recovering damages for the alleged conversion by the appellants of two bales of cotton, a part of a crop raised by one Finney, on which the appellee averred he had a lien under the statute for advances made by him to Finney to enable him to raise the crop, of which lien the appellants had notice. The lien was claimed, as shown by the bill of exceptions, under a crop-lien note for advances for \$177.72, the recitals and terms of which are in substantial compliance with the statute; but it was shown that a part of the consideration of the note was "an account for about twenty-five dollars due from said Finney to a third party," which had been placed in the hands of the appellee as an attorney for collection. The Circuit Court held that the appellee had a lien on the cotton under the note, for the money actually advanced by the appellee to Finney, and so instructed the jury, and the appellants excepted. A judgment was rendered on verdict for the appellee.

The ruling of the court above noted is here assigned as error.

J. T. NORMAN, for appellant.

H. C. TOMPKINS, *contra*.

(No briefs came to the hands of the reporter.)



[Wilkinson v. Ketler.]

SOMERVILLE, J.—The judgment in this case is reversed on the authority of *Pearson v. Evans*, 61 Ala. 416, and the cause is remanded. The written note or obligation, on which this suit is founded, did not conform strictly to the requirements of section 3286. The consideration was not exclusively for advances obtained for the purpose of enabling the promisor to make a crop. A material portion of the consideration was an account due from the maker of the note to a third party, which the payee had in his hands for collection, and, under the above authority, this, being intentionally and knowingly included in the note, operated to vitiate it as a statutory crop-lien note for advances.

STONE, J., *dissenting*.—I did not sit in the case of *Pearson v. Evans*. I dissent both from that opinion and from this. I do not think a crop-lien for advances should be vitiated, merely because some items of the claim are for articles for which the statute gives no lien. That error is frequently committed ignorantly and innocently. Between the parties, such error certainly should not vitiate. And outsiders, unless they are creditors who would be defrauded by simulated liability, are not injured, and of course are not defrauded. In the absence of fraud, I think such declaration of lien should stand good, to the extent the statute authorizes such lien to be declared.

## Wilkinson v. Ketler.

### *Statutory Action of Detinue.*

1. *Mortgage on unplanted crop; merely an equitable lien*.—A mortgage on a crop to be afterwards planted, unlike a mortgage on a growing crop, does not pass to the mortgagee the legal title, but creates only an equitable lien, which will not support an action of detinue for the recovery of the crop after it has matured and been gathered, until, at least, there has been a delivery under the mortgage.

2. *Mortgage on crop; when crop is a growing one*.—A crop must be considered and treated as a growing crop, from the time the seed are deposited in the ground, as at that time the seed lose the qualities of a chattel, and become a part of the freehold, and pass with a sale of it.

3. *Landlord's lien for advances; none existed from March 18, 1875, to February 9, 1877*.—From March 18, 1875, when the act entitled "An act to amend sections 2961 and 2962 of the Revised Code," was approved (Acts 1874-5, p. 255), until the approval of the act of February 9, 1877, (Acts 1876-7, p. 74), now embraced in §§ 3467, *et seq.* of the Code of 1876, the landlord had no statutory lien for advances made by him to tenant. Re-

[Wilkinson v. Ketler.]

affirming decision on this point in this case on former appeal (59 Ala. 306).

4. *When provision in rent contract constitutes a parol mortgage.*—A provision in a parol contract of renting, by which the landlord reserved the right to contract and sell the crop to be raised by the tenant on the rented lands, the proceeds of the sale thereof to be applied to the payment of advances made by the landlord to the tenant, created merely a lien or parol mortgage on the unplanted crop of the tenant, for the security of such advances, which did not clothe the landlord with the legal title, nor limit the mortgageable interest of the tenant in the crop to the surplus which might be left after paying the advances.

5. *Prior to the statute, notice of relation of landlord and tenant was not constructive notice of contract lien for advances.*—Prior to the adoption of the statute giving a landlord a lien on the crop of the tenant for advances, notice to a third party dealing with the tenant, that he farmed on rented lands belonging to the landlord, did not constitute constructive notice that the landlord had made or would make advances to him, or that the landlord had a lien or mortgage securing such advances.

#### APPEAL from Butler Circuit Court.

Tried before HON. JOHN P. HUBBARD.

This was an action of detinue, under the statute, brought by the appellant against the appellee, for the recovery of two bales of cotton, and some corn; was commenced on 2d December, 1875, and was before this court, on appeal, at the December Term, 1877, when the judgment of the court below was reversed and the cause remanded.—*Wilkinson v. Ketler*, 59 Ala. 306. After the cause was remanded another trial was had, which resulted in a verdict and judgment for the defendant. The defendant's plea is not disclosed by the record on this appeal, but it appears from the record on the former appeal, that the first trial was had on the plea of "the general issue, with leave to give in evidence any matter that might be specially pleaded." The bill of exceptions taken on the second trial shows, that the matter of controversy and litigation was only one bale of cotton; and that on the trial plaintiff read in evidence a written obligation made by one March Cook, dated April 10th, 1875, by which he promised to deliver to the plaintiff three bales of cotton on the 1st day of October, 1875, of a stated weight and classification, in consideration, as recited in the obligation, of certain advances then made to him by plaintiff for the purpose of enabling him to make a crop during that year. The plaintiff also read in evidence a mortgage executed by Cook of even date with said obligation, duly recorded, and securing the faithful performance thereof, by which Cook conveyed to the plaintiff, together with other property, "all of my crop for present year, 1875," which crop, as shown by the evidence, was planted about the 1st of April 1875, but "there was no evidence as to whether the crop was growing or *in esse* at the time the mortgage was executed, other than its being planted as aforesaid." The evidence for the plaintiff also tended to

[Wilkinson v. Ketler.]

show, that Cook had not complied with or performed his said obligation; that the bale of cotton in controversy was a part of the crop raised by Cook during the year 1875, and that it was grown on lands rented by him from the defendant, and was in her possession when the suit was brought; that plaintiff, at the time the mortgage was executed, knew that Cook was the tenant of the defendant during said year, but that he did not know or have any notice of the terms and stipulations of the rental contract between defendant and Cook, and that the plaintiff never had possession of the bale of cotton in controversy before the commencement of the suit.

The defendant was examined as a witness in her own behalf, and her testimony tended to show, that, in January, 1875, she rented to March Cook for that year, forty-seven acres of land, in consideration of which, and as rent therefor, Cook was to cultivate for her eighteen acres of land—eight acres in corn and ten in cotton—which were to be well cultivated and the crop raised thereon to be gathered in good order and in due time; that said contract of renting was not in writing; that she thereby agreed to make, and did make advances to Cook during that year; that the amount of such advances was \$164.14, of which a part is still due; that only a small part of such advances was made prior to the 18th March, 1875, and that she had received, before she obtained the bale of cotton in controversy, from Cook's crop enough to pay for the advances which she had made to him prior to said date. Her testimony also tended to show, that the crop was turned over to her by Cook according to a provision in the contract of renting, by which she was to take the control of, and sell the crop for the payment of the advances which she had agreed to make to him; that Cook died before the crop was gathered; that one Freeman worked with Cook during that year, and was to receive for his work a part of the crop raised on said rented land, and that Freeman had turned over to defendant his undivided part of the crop, in payment for advances which she had let him have.

The general charge of the court is divided into six separate and distinct propositions, numbered from 1 to 6, inclusive, to each of which the plaintiff separately excepted. These propositions are substantially as follows: The first is based on the theory, that the contract between the defendant and Cook in reference to the advances which she agreed to make to him, clothed her with the legal title to the cotton in controversy, and that no such title passed to the plaintiff under the mortgage which Cook afterwards executed to him, "as is necessary to enable him to recover." The second denied the right of the plaintiff to a recovery under his mortgage, if at the time the same was executed, he had notice of the contract between defendant and



[Wilkinson v. Ketler.]

Cook, and of the lien of defendant thereunder. The third is based on the theory that knowledge on the part of plaintiff of the relation of landlord and tenant existing between the defendant and Cook, at the time his mortgage was executed, was constructive notice to him of the terms of the tenancy and of the defendant's rights under said contract. The language of the fourth proposition is: "If you believe from the evidence that the mortgage, under which plaintiff claims the bale of cotton, was given and executed at a time before the crop was planted, or even if it had been planted, it is invalid to pass such title to plaintiff as to enable him to recover the bale of cotton sued for, unless he had come into the possession of said cotton before the suit was commenced." The fifth and sixth propositions are substantially the same. The language of the sixth is: "If the crop of cotton, on which plaintiff's said mortgage was taken, at the time it was executed, was not a growing crop, or a crop *in esse*, as distinguished from an unplanted crop, or a merely planted crop, then it could not pass to plaintiff such title to the bale of cotton as is necessary to enable plaintiff to recover in this action.

The plaintiff then asked the court in writing to give two charges to the jury, numbered respectively 1 and 2. The court gave the charge numbered 2, but refused the other; and to the refusal of the court to give the former the defendant excepted. This charge is, in substance, that, if the jury believe from the evidence, that Cook's crop had been *planted* at the time he executed to plaintiff the mortgage on said crop, and that the cotton in controversy was a part of that crop and was in possession of the defendant when the suit was brought, and the mortgage had not been satisfied, then the plaintiff was entitled to recover, unless the defendant had shown to their satisfaction, that "she made the proper and necessary advancements in provisions, teams or farming implements, or money to buy the same, to assist in making said crop, before the 18th day of March, 1875, to a greater amount or value, than the amount the proof shows she had received of said Cook, or from his said crop." The portions of the general charge excepted to, and the refusal to give the charge requested by the plaintiff, are here assigned as error.

J. W. POSEY and J. C. RICHARDSON, for appellant.—(1). Under the decision in this case on former appeal, the defendant, under the peculiar terms of her contract of renting with Cook, had no lien on the crop for advances.—59 Ala. 306. (2). "At law, a mortgage can operate on property, either actually in existence at the the time of giving the mortgage and then actually belonging to the mortgagor, or potentially belonging to him as

[Wilkinson v. Ketler.]

an incident of other property then in existence and belonging to the mortgagor. And a lessee or renter of land has a sufficient interest in the land, to enable him to execute a valid mortgage of the crop to be grown upon the land during the whole term of the lease or rent."—Jones on Chattel Mortgages, §§ 140–1, and authorities cited in notes thereto; *Cotten v. Willoughby*, 35 Am. Rep. 565; *Everman v. Robb*, 52 Miss. 653; *Arques v. Wassom*, 51 Cal. 620; 22 Am. Rep. 644–56; *Butt v. Ellett*, 19 Wall. 544; *Moore v. Byrum*, 30 Am. Rep. 61, and notes; *Jones v. Webster*, 48 Ala. 112; *Stearns v. Gafford*, 56 Ala. 545; *Thrash v. Bennett*, 57 Ala. 161; *Booker v. Jones*, 55 Ala. 273; *Cook v. Steel*, 42 Texas, 53; *Robinson v. Ezzell*, 72 N. C. 232. A potential existence, as defined in *Moore v. Byrum*, *supra*, is "the prospective yield of something which has an actual existence." It is the future products of a substance which has ownership and being. It includes a planted crop.—4 Am. Dec. 560. See also Benj. on Sales, § 74; *Butler v. Hill*, 1 Baxter, 375. (3). But the crop, having been planted ten days, was a *growing crop*, and when severed from the soil, the legal title thereto passed under the mortgage.—*Robinson v. Maulden*, 11 Ala. 981; *Adams v. Tanner*, 5 Ala. 742; *Lehman, Durr & Co. v. Marshall*, 47 Ala. 376, and other authorities *supra*. "The cotton plant in this climate is an annual,—known in the 'Science of Plants' as *Gossypium Hirsutum*. It is judicially known to be from seed sown in March and April, and that according as the earth is damp and warm, or dry and cold, the seed send a plant above the surface of the ground in from 4 to 10 days. (See Royles on cotton culture.)"—*Floyd v. Ricks*, 14 Ark. 286; *Rex v. Luffe*, 8 East 202; *Fay v. Prentice*, 9 Jur. 876; *Soloman's case*, 28 Ala. 88; *Brown v. Piper*, 1 Otto, 42; *The Scotia*, 14 Wall. 188; *Luke v. Calhoun County*, 52 Ala. 119. (4). Defendant's contract having been made in January, the legal title to Cook's crop did not pass to her thereunder; and of her lien under the contract the plaintiff had no actual knowledge, and he can not be held to have had constructive notice thereof, from his knowledge of the existence of the relation of landlord and tenant between defendant and Cook.

GAMBLE & PADGETT, *contra*.—(1). By the terms of the contract of renting the title to the crops to be raised by Cook, was retained by the defendant; and the parties had the right so to provide in the contract.—*Rinehart v. Olwine*, 5 Watts & Serg. 157; *Booker v. Jones*, Adm'r, 55 Ala. 266. This being the case, Cook had no title to the crop, which he could convey to the plaintiff; and, therefore, Cook's mortgage to plaintiff did not convey such title, and he can not recover. (2). The evidence shows that the mortgage was made on the 10th April, and

[Wilkinson v. Ketler.]

that the crop was planted about 1st April. It is quite clear under this evidence, that the crop was not, when the mortgage was executed, a "*growing crop or in esse*." This being the case the plaintiff had no such title under his mortgage as would support detinue.—*Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, 65 Ala. 256; *Booker v. Jones Adm'r*, 55 Ala. 266. (3). The plaintiff knew that the relation of landlord and tenant existed between the defendant and Cook, when his mortgage was executed, and this was sufficient to put him on inquiry. He is, therefore, chargeable with notice of the terms of the contract between defendant and Cook.

STONE, J.—We have settled in this State, and have no wish to depart from it, that a mortgage may be made on a growing crop, and that after the crop matures and is gathered, there is a legal title in the mortgagee, which will support an action for the recovery of chattels in specie—our statutory action of detinue. But a mortgage on a crop, to be afterwards planted and grown, stands in a different category. Such conveyance, at most, creates only an equitable lien; and, until the sale is perfected by a delivery of the product, no legal title exists in the mortgagee, and he can maintain no action at law for its recovery. In such condition, the legal title remains in the mortgagor. *Rees v. Coats*, 65 Ala. 256; *Booker v. Jones*, 55 Ala. 266.

The testimony in the present case tends to show that the crop was planted before, or by April 1st, 1875. The mortgage to Wilkinson bears date April 10th. There is no testimony on the subject whether, at that time, the crop had become visible above the ground, or, indeed, whether the seed had germinated. When must a planted crop be treated as a growing crop? If we were to enter upon the inquiry, what time is necessary for the germination of planted seed, we should encounter difficulties the shrewdest sagacity can not foreknow. Attending conditions enter materially into this inquiry. The many species of seeds employed in agriculture, have different periods for germination. The seasons—heat and moisture, or their absence—are factors in the solution of this problem. We think the only reasonable solution is, to hold that the crop must be treated as growing, from the time the seed is deposited in the ground. At that time it loses its qualities as a chattel, becomes part of the freehold, and passes with a sale of it. We thus relieve the question of all conjecture or judgment, as to the time when the planted seed takes on the incipient stage of vegetable life—when it becomes a growing crop. In other words, when it begins to grow.—4 Kent Com. 468; 3 Washb. Real Property, 338-9.

When this case was before in this court—59 Ala. 306—we  
VOL. LXIX.



[Wilkinson v. Ketler.]

held that from March 18, 1875, to February 9, 1877, the landlord had no statutory lien for advances made to the tenant. It was during this interval that Cook executed the mortgage to Wilkinson, upon which the plaintiff relies for a recovery. It follows that Mrs. Ketler can assert no claim for advances made after March 18, based on mere statutory lien. The contract of letting, by which Cook became her tenant, was oral, and antedated the mortgage to Wilkinson. In her testimony she employs these expressions, speaking of her contract with Cook: "Said crop was placed in my possession by a voluntary act of March Cook, according to contract before the crop was planted. . . . He, March Cook, was to have forty-seven acres, more or less, known by said March Cook, portion of land was to be mine to control, and sell and pay myself for all advances or indebtedness whatsoever. . . . Said supplies were sold to March Cook, and to be paid for when I sold the crop on his portion of land, or the land he was to cultivate for himself. . . . The entire crop of March Cook was turned over to me by the voluntary act of said Cook, unasked for by me, that being the contract before planting of said crop."

There is a seeming inconsistency in Mrs. Ketler's testimony. She says the entire crop was turned over to her by the voluntary act of March Cook, her tenant; yet she proves that March Cook died before the crop was gathered, or harvested.

Under Mrs. Ketler's testimony, copied above, it is contended that the crop of cotton and corn were to be her property to sell, and out of the proceeds, to pay herself for advances, and all other indebtedness. From this, the conclusion is claimed, that Cook, the tenant, had no mortgageable interest in the crop, save of such part as should remain, after paying Mrs. Ketler in full. There being no surplus, it is contended that Wilkinson can take nothing by his suit. Giving to Mrs. Ketler's testimony its fullest effect, we do not think it amounts to more than a lien, or parol mortgage. It did not clothe her with a title to the crop, which we have seen was not then planted.—*Rees v. Coats, supra*. In *Butterfield v. Baker*, 5 Pick. 522, there was a lease of a farm by indenture, with a provision, "that for the payment of the rent quarterly, all the produce of the farm, whether standing and growing, or harvested and collected, if deposited upon the estate, should be holden, and be at the disposal of the lessor, in the same manner as if she were in the actual occupation of the farm; and that she should be authorized at all times to enter into the premises and take therefrom, for the payment of any portion of the rent that might be in arrear, any ripe crops standing and growing on the premises, or gathered and deposited on the same, she accounting to the lessee for all proceeds of the produce so taken, at a fair market price, towards the

[Allen v. Kellam.]

payment of the rent." The tenant, having in his possession certain corn raised on the premises, it was attached as his property, at the suit of a creditor. There was rent due on the premises, and the question was, whether the corn was subject to attachment as the property of the tenant. It was ruled that the attachment lien was paramount to the claim of the landlord. To the same effect are *Munsell v. Carew*, 2 Cush. 50, and *Lewis v. Lyman*, 22 Pick. 437. And the principle of these cases is made a part of the text of Jones on Chattel Mortgages, § 143. We think this case falls short of the principle declared in Jones on Chat. Mort. § 141.—*Booker v. Jones*, 55 Ala. 266.

In what we have said above, we refer to the title to Cook's crop, which his mortgage conveyed to Wilkinson, and to Mrs. Ketler's claim on the same crop. We make no reference to Freeman's crop, which the testimony tends to show was delivered to Mrs. Ketler. Wilkinson fails to show any right to that.

We do not think notice to Wilkinson that Cook was tenant on lands rented of Mrs. Ketler, as the law then stood, was constructive notice to him that she had made, or would make advances to him. The law then gave her no lien for such advances, and it could only exist by contract. Wilkinson can not be charged with a knowledge of the existence of such lien or parol mortgage, unless the jury are convinced he was informed, or had knowledge of it. The law is different now.—*Wilson v. Beard*, at present term.

Each of the charges, from 1 to 6 inclusive, except the one numbered 2, is opposed to the views above expressed. Charge No. 1 asked by defendant should have been given as asked; but if part of the cotton in the bale had been Freeman's, and had been turned over by him to Mrs. Ketler in payment, then it would have been proper to instruct the jury on that phase of the case.—*Smith v. Rice*, 56 Ala. 417.

Reversed and remanded.

## Allen v. Kellam.

### *Statutory Real Action in Nature of Ejectment.*

1. *Grant of letters of administration during late war valid; subsequent grant, without vacancy, void.*—The grant of letters of administration by the probate courts of this State during the late war between the States, was legal and valid; and a subsequent grant of letters, without a revocation of those already granted, or vacancy in the administration created

[Allen v. Kellam.]

by some other cause, is absolutely void, and being void, as opposed to voidable merely, it can be collaterally assailed.

2. *Vacancy in administration ; when not presumed from subsequent grant.*—While it may be true that, in a collateral proceeding, a vacancy in the administration of an estate will be presumed to exist, in the absence of any recital or evidence of the fact, from the grant of administration *de bonis non* ; yet, such presumption can not prevail where there is evidence affirmatively showing, that there was no vacancy at the time of the second grant.

3. *Sale by administrator acting under void appointment, also void.*—A sale of real estate, made by one acting as administrator *de bonis non* under a void appointment, is void, and a deed executed by him in pursuance of such sale, does not convey the legal title to the purchaser ; but such title remains in the heirs of the decedent, and will support an action of ejectment brought by them against the purchaser in possession.

4. *Ejectment ; when estoppel in pais no defense.*—In ejectment brought by the heir against the purchaser at a void sale made by the administrator of the intestate's estate, the heir is not estopped from a recovery by reason of the fact that he was present at the sale and made no objection, or because the proceeds of the sale went to his use.

5. *Mortgagor of real estate ; as against strangers, the real owner.*—The mortgagor of real estate must be considered as the real and legal owner against all persons except the mortgagee, and, as against them, he can maintain ejectment for the recovery of the real estate conveyed by the mortgage.

6. *Ejectment by mortgagor against a stranger ; mortgage no defense.*—A defendant in ejectment can not set up, in the defense of a suit brought by a mortgagor, the out-standing legal title in the mortgagee, with which he does not connect himself.

7. *Ejectment ; color of title and good faith under section 2966 of the Code.*—A deed made by one acting as administrator under a void appointment, though void itself, is color of title within the meaning of section 2966 of the Code of 1876, providing that persons holding under color of title, in good faith, are not responsible for damages or rent, in actions for realty, for more than one year before the commencement of the suit, when, on its face, it appears to convey a good title, and its defects are made manifest only by proof of extrinsic facts.

## APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

This action was brought by John W. Kellam and Robert L. Kellam, heirs at law of James W. Kellam, deceased, against J. F. Davis, as tenant in possession of D. G. Allen, for the recovery of a lot of land in the town of LaFayette, in Chambers County, in this State, and was commenced on 1st August, 1881. Prior to the trial D. G. Allen, the landlord, was, on his motion, made a party defendant. The judgment entry recites that "issue was joined between the parties," but the record fails to show any pleadings subsequent to the complaint. There was no conflict in the evidence, and it was substantially as follows : In 1863 or 1864, James W. Kellam died intestate in Chambers county, in this State, seized and possessed of the land sued for in this cause, and leaving the plaintiffs as his only heirs at law. On 20th December, 1864, letters of administration upon his estate were granted by the Probate Court of said county to



[Allen v. Kellam.]

Samuel Spence. In August, 1871, W. Costley, on his own petition, was appointed by that court administrator *de bonis non* of said estate. Spence had never been removed, nor had a vacancy in the administration of the estate otherwise occurred; but Costley was appointed under the influence of the decision in the case of *Bibb & Falkner v. Avery*, 45 Ala. 691, Spence having "refused to re-qualify as the administrator" of the estate. On 22d October, 1873, Costley, acting as the administrator of the estate, and under the decree of the probate court, sold the lands belonging to the estate, including the lot sued for, at public outcry, for division among the heirs, and at the sale the defendant, Allen, purchased the lot in controversy, paid the purchase-money, and was let into possession under his purchase. On the 11th November, 1873, the sale was confirmed by the court, and Costley, as such administrator, under the orders of the court, executed and delivered to Allen a deed to the lot. John W. Kellam, one of the plaintiffs, arrived at his majority in September, 1873, and he was present at the sale and made no objection thereto. There was also evidence tending to show that he received a part, if not all, of his share of the purchase-money for the lot, from Costley, after he became of age. Robert L. Kellam, the other plaintiff, did not become of age until 1879, and he received no part of the purchase-money paid for the lot. On 7th July, 1881, the plaintiffs executed a mortgage to their attorneys to secure them for certain services then contracted to be rendered by them in the future, for the plaintiffs, by which they conveyed to the attorneys the lot sued for in this cause, together with other real estate. Allen continued in possession of the lot until the time of the trial holding the same, in good faith, under his purchase from Costley. The value of the rent of the lot was also proved.

The court charged the jury, at the written request of the plaintiffs, that if they believed the evidence, they must find for the plaintiffs; and refused, on the written request of the defendant, to charge the jury, that if they believed the evidence, they must find for him, and he duly excepted. The court, in its general charge, also instructed the jury "that the sale from Costley as administrator to Allen, and the deed from Costley to Allen, did not constitute such color of title as would prevent the plaintiffs in this action from recovering the full amount of rents from the time the defendant went into possession of the land sued for, and that they must assess the value of the rents from the time Allen went into possession of said land up to the time of this trial;" and to this part of the general charge the defendant excepted. A judgment was rendered for the plaintiffs, on verdict, for the lot of land sued for, and also for the full value of the rents during the time the defend-

[Allen v. Kellam.]

ant was in possession; and from this judgment the defendant appealed, and here assigned as error the rulings of the Circuit Court above noted.

ROBINSON & DENSON and E. G. RICHARDS, for appellant. (1) The court will presume, that Spence was either removed by the court or had resigned.—*Sims v. Waters*, 65 Ala. 442. (2) The probate court having acquired jurisdiction, on the filing of the petition, to sell the land belonging to Kellam's estate, by Costley, it cannot be collaterally assailed. The petition averred that Costley was the administrator; that the lands belonged to the estate and could not be equitably divided amongst the heirs without a sale. All these were issuable facts, and the court having passed upon them, its decree can not be collaterally assailed.—6 Peters, 709; 2 How. 319; 2 Wall. 210. 6 Porter, 209; 63 Ala. 436; 64 Ala. 410. See also *Thompson v. Tolmie*, 2 Peters, 157; *Coltart v. Allen*, 40 Ala. 155. (3) The deed from Costley to Allen was such color of title as prevented a recovery by plaintiffs of rents for more than one year before the commencement of suit.—Code, § 2966; 62 Ala. 426 and authorities there cited. (4) The mortgage from plaintiffs to the attorneys was such an outstanding title in another as could be shown by the defendant in defense of the action.—54 Ala. 317; 6 Baxter (Tenn.), 216.

DOWDELL & HOLMES, *contra*. (1) The appointment of Costley, as administrator, was made when there was a legal, valid and subsisting administration of the same estate within the same jurisdiction. The second appointment was, therefore, void.—*Matthews v. Douthitt*, 27 Ala. 273; *Rambo v. Wyatt's Adm'r*, 32 Ala. 363; *Coltart v. Allen*, 40 Ala. 155; *Nelson, Adm'r v. Boynton*, 54 Ala. 368; *McDowell, Adm'r v. Jones*, 58 Ala. 25. (2) Costley's appointment being void, his acts as administrator were also void, and can be attacked collaterally. He could not bind the estate by dealing, as administrator, with third persons, nor can his acts be upheld upon the principles sustaining *de facto* officers.—*Hooper, Adm'r v. Scarborough*, 57 Ala. 510, overruling *Green v. Scarborough*, 49 Ala. 137. The sale of the lands made by Costley, as administrator, therefore, did not divest the title out of the heirs. (3) The legal title being still in them, it must prevail in this action regardless of equities.—*Kelly v. Hendricks*, 57 Ala. 193; *Collins v. Johnson*, 57 Ala. 304; *Hooper, Adm'r v. Scarborough*, *supra*; *Casey v. Morgan*, 67 Ala. p. 441. The appointment of Costley, as administrator, and his acts thereunder being void; and the invalidity of his appointment being shown by the records of the probate court granting the order of the sale, and

[Allen v. Kellam.]

the proceedings of such court necessary to authorize and empower an administrator to sell and convey lands of his intestate, being a part of the deed, the deed is not only void, but its invalidity appears on its face. The deed could not, therefore, be such color of title as would support the claim of adverse possession, or defeat the recovery of rents for more than one year under the statute.—*Casey v. Morgan*, *supra*; *Moore v. Brown*, 11 How. (U. S.), 414; *Walker v. Turner*, 9 Wheat. 541; *Powell v. Harman*, 2 Peters, 241; Tyler on Eject. 870-4; Abbott's Law Dic. Vol. I, p. 242. (5) The mortgagor is regarded as the proprietor of the mortgaged premises and entitled to possession as against all persons except the mortgagee or his assignees, and he may maintain ejectment.—2 Brick. Dig. p. 248.

SOMERVILLE, J.—It has been decided by this court, that the probate of wills and the grant of letters of administration, by the probate courts of this State during the late war between the States, were perfectly legal and valid; and that a subsequent grant of letters, without a revocation of those already granted, would be a nullity, there being no vacancy in the administration. And the contrary doctrine, as held in *Bibb & Falkner v. Avery*, 45 Ala. 691, was expressly repudiated in *Nelson, Adm'r, v. Boynton*, 54 Ala. 368.

Under this principle, the appointment of Spence as administrator of the estate of Kellam was valid, though made in the year 1864, during the prevalence of the late war. And there being a legal and subsisting administration, the probate court possessed no jurisdiction to appoint Costley as administrator of the same estate, without first creating a vacancy in the administration by the revocation of the letters already granted to Spence, or a vacancy occurring by death, resignation or removal. The appointment of Costley, without such previous vacancy, must be held to be absolutely void, and being void, as opposed to voidable merely, it can be collaterally assailed.—*McDowell v. Jones*, 58 Ala. 25; *Matthews v. Douthitt*, 27 Ala. 273; *Rambo v. Wyatt*, 32 Ala. 363; *Gray's Adm'r v. Cruise*, 36 Ala. 559.

It may be true that, in a collateral proceeding, such vacancy will be presumed to exist from the grant of administration *de bonis non*, in the the absence of any recital or evidence of the fact, but this presumption can not prevail where there is evidence, as in this case, showing affirmatively that there was no vacancy at the time of the second appointment.—*Sims v. Waters*, 65 Ala. 442; *Ikelheimer v. Chapman*, 32 Ala. 676; *Gray v. Cruise*, 36 Ala. 559.

It follows from these principles, that the sale of the real estate in controversy, which was attempted to be made by



[Allen v. Kellam.]

Costley, and at which the appellee, Allen, became the purchaser, was void as being without authority, and conferred no title. *Hooper, Adm'r, v. Scarborough*, 57 Ala. 510. The legal title still remained in the heirs of Kellam, and will support an action of ejectment. Nor even were they *sui juris*, could the principle of estoppel be invoked against them in a court of law by reason either of their silence, or of the equitable consideration that the proceeds of sale went to their use, or that of the estate.—*Kelly v. Hendricks*, 57 Ala. 193; *Robertson v. Bradford*, at present term.

It is no defense to an action of ejectment brought by a mortgagor, against any other person than the mortgagee, that the legal title is in the mortgagee, and the law day of the mortgage has arrived. The mortgagor must be considered as the real and legal owner as against every stranger, and a defendant in ejectment is not permitted to set up an outstanding legal title in a mortgagee with which he does not connect himself. The better and prevailing doctrine is, that a mortgage is a mere security as to third persons, and as to them the mortgagor has such a title as will support ejectment.—*Denby v. Mellgrew*, 58 Ala. 147; *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Scott v. Ware*, 65 Ala. 174; *Wilson v. Troup*, 14 Amer. Dec. 458, NOTE, p. 474, 1 Jones, Mortg. § 11; *Woods v. Hilderbrand*, 2 Amer. Rep. 513; 3 Wait's Act. and Def. 66. It was not material, therefore, that the plaintiffs had executed a mortgage on the premises sued for, as the defendant fails to show he was in any manner connected with it.

A mere purchaser, at execution sale, of the equity of redemption owned by the mortgagor has been placed on a different footing by our decisions—a conclusion in which I am not at present prepared to concur.—*Atcheson v. Broadhead*, 56 Ala. 414; *Childress v. Monette*, 54 Ala. 317; Code of 1876, § 3209, *sub. div. 3*.

The deed executed by Costley to Allen clearly constituted color of title, and the court erred in charging to the contrary. Though void in fact, it was *prima facie* a good title, and its defects are made manifest by proof of extrinsic facts not appearing on its face. That a void deed may be good as color of title can scarcely be said to admit of question, and certainly not under the decisions of this court. Defects in title, in such cases, are material, however, as affecting the *bona fides* of the grantee, and will not be permitted to destroy color, unless they are so patent that a person of common understanding is held to take notice of them.—*Molton v. Henderson*, 62 Ala. 426; *Ladd v. Dubroca*, 61 Ala. 25; *Riggs v. Fuller*, 54 Ala. 141; *Dillingham v. Brown*, 38 Ala. 311; *Tate v. Southard*, 14 Amer. Dec. 578, NOTE, 583-4; *McMullin v. Erwin*, 58 Ga.

[Morrison v. Stevenson.]

427; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Lindsay v. Fry*, 25 Wis. 460; *Brooks v. Bruyn*, 35 Ill. 394.

The statute provides expressly that persons holding under *color of title, in good faith*, are not responsible for damages or rent [in actions for realty] for more than one year before the commencement of the suit."—Code of 1876, § 2966. The evidence discloses the utmost good faith on the part of Allen in making the purchase of the lands in controversy. It may well be that he regarded the deed as perfectly good in view of the decision of this court in the case of *Bibb & Falkner v. Avery*, *supra*, which as above stated, was afterwards overruled.

Reversed and remanded.

## Morrison v. Stevenson.

### *Statutory Real Action in Nature of Ejectment.*

1. *Construction of pre-existing statute adopted by re-enactment of the statute.*—It is a settled rule, that in the adoption of the Code, the legislature is presumed to have known the fixed judicial construction, which pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction.

2. *Section 3235 of the Code construed.*—Section 3235 of the Code of 1876, allowing a plaintiff or his legal representative to commence suit again within one year from the arrest of a judgment obtained by him, or from the reversal of such judgment on appeal, although the period limited may in the meantime have expired, refers only to actions at law and judgments therein rendered, and can not be extended, so as to save an action at law, commenced within a year after the reversal of a decree in equity, rendered for the same cause and upon the same right of action.

3. *Statute of limitations; party insisting on exception to, must bring himself within the exception.*—Section 3235 of the Code of 1876, is, in its nature and operation, an exception to the general statute of limitations, in that it withdraws from the influence of the statute a particular case, which would otherwise fall within the words and bar of the statute; and a party insisting on the exception thereby created, must point out the exception and bring himself within its saving terms.

4. *Section 3756 of the Code; merely a legislative affirmation of a prevailing principle.*—The statute embraced in section 3758 of the Code of 1876, providing that the statute of limitations should apply to suits in chancery, is a mere legislative affirmation of the principle which prevailed at the time of its adoption; and it does not extend the exception to the statute of limitations created by section 3235 of the Code, so as to save an action at law, which had been commenced within a year after the reversal of a decree in equity, rendered for the same cause and upon the same right of action.

APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

VOL. LXIX.

[Morrison v. Stevenson.]

This was a statutory real action in the nature of ejectment, brought by Mary E. Morrison and others, the appellants, against Henry Giddens and Harrison Stevenson, for the recovery of a tract of land, and was commenced on 24th of September, 1880. Henry Giddens disclaimed all interest in the lands; but Harrison Stevenson, the appellee, defended the suit and set up, among other defenses, the statute of limitations of ten years. To this plea the plaintiffs replied, that "said plaintiffs heretofore, to-wit: on the 10th day of October, 1872, filed their bill in the Chancery Court of said Lowndes county, against said defendant, praying for a decree of said court to remove a cloud from the title of plaintiffs to the said land sued for in this action of ejectment and to recover the same, together with the rents and mesne profits thereof during the possession of the defendant, and for general relief, and that they obtained and were granted by said Chancery Court a decree in favor of the plaintiffs and against said defendant for the removal of said cloud from their said title to said land, and for the recovery of said land together with the said rents and mesne profits thereon, as ascertained by said court, on to-wit: the—day of——187—; that thereupon the defendant took an appeal from said decree to the Supreme Court of the State of Alabama, and upon the hearing of said appeal in said Supreme Court, at the term thereof of December 1879, and within twelve months before the bringing of this suit in ejectment now here pending, the said Supreme Court reversed the said decree of said Chancery Court, which was rendered therein in favor of plaintiffs as aforesaid." To this replication the defendant demurred on the ground, that "the proceedings of the said Chancery Court mentioned in said replication, is not one of the cases mentioned in section 3235 of the Code of 1876." The court sustained the demurrer to the replication; and upon issue joined upon the defendant's pleas, the cause was tried and resulted in a judgment for the defendant. From this judgment the plaintiffs appealed, and here assign as error the action of the court below in sustaining the defendant's demurrer to said replication.

COOK & ENOCHS, for appellant.

DAVID CLOPTON, W. C. GRIFFIN, and CLEMENTS & TYSON,  
*contra.*

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The replication to the plea of the statute of limitations is founded on the statute (Code of 1876, § 3235), which provides: "If suit be brought in any of the said actions,



[Morrison v. Stevenson.]

before the time limited has expired, and judgment be rendered for the plaintiff, and such judgment be arrested or reversed on appeal, the plaintiff, or his legal representative, may commence suit again in one year from the reversal or arrest of such judgment, though the period limited may in the meantime have expired; and in like manner, if more than one judgment be reversed or arrested an action may be recommenced within one year." This section of the Code is a re-enactment of a previous statute with but slight changes of phraseology, and without addition other than the last clause referring to successive or cumulative actions, which has no bearing on the question now involved.—Clay's Dig. 328, 586.

It is a settled rule, that in the adoption of the Code, the legislature is presumed to have known the fixed judicial construction pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction.—*Duramus v. Harrison*, 26 Ala. 326; *Ex parte Banks*, 28 Ala. 28; *Stallworth v. Stallworth*, 29 Ala. 76; *Bank of Mobile v. Meagher*, 33 Ala. 622. In *Roland v. Logan*, 18 Ala. 307, the precise question arising on the replication was presented to this court, dependent on the interpretation and construction of the pre-existing statute, of which the present statute is a re-enactment in substance. It was held the statute referred only to actions at law and judgments thereon rendered, and could not be extended so as to save an action at law, commenced within a year after the reversal of a decree in equity rendered for the same cause and upon the same right of action. The correctness of the decision can not be seriously questioned. The words of the statute refer only to actions at law and judgments therein rendered which may be reversed or arrested.

In its nature and operation the statute creates an exception to the general statute of limitations—it withdraws a particular case, which otherwise would fall within the words and bar of the statute. A party insisting on an exception to the bar of the statute of limitations, must point out the exception and bring himself within its saving terms. He must maintain a right to the exception, by its terms, or by authority, or on some principle clearly analogous to the decided cases in exposition of the exception. By fair construction, by just interpretation, the words of the statute can not be extended to an action at law commenced within one year after the reversal of a decree in equity. This was the known, fixed judicial construction the former statute had received, and with that construction it was incorporated into the Code. If there had been a legislative intention to change the construction, there would have been a

[Morrison v. Stevenson.]

change of the phraseology of the statute, or the addition to it of words clearly expressing the intention.

It is insisted that, as by statute, the statute of limitations is made applicable to suits in chancery (Code of 1876, § 3758), the statutory exception should be construed so as to embrace a case like the present, in which there was a decree in chancery reversed, and a subsequent action at law founded on the same cause or matter. This is not a suit in equity and it is to suits in equity—suits which are pending—it is declared the statute of limitations shall be applied. Before the enactment of the statute, the principle prevailing in courts of equity in this State was, that in all cases of concurrent jurisdiction, the statutes of limitation were as obligatory on these courts as on courts of law. In all cases of exclusive equitable cognizance, the courts applied them by analogy, and thus they were obeyed in equity as at law.—1 Brick. Dig. 698, 852-4. The statute is a mere legislative affirmation of the principle prevailing at the time of its adoption. In the Code may be found many similar affirmations—legislative adoptions of individual expositions of the common law. From the incorporation into a revision or codification of statutes of rules of law or of equity, there can be no presumption or intendment that such rules were not the law previously, or that it is intended to contract or to expand their operation. The whole argument of appellants is founded on the erroneous supposition that the express statutory declaration, that the statutes of limitations are applicable to suits in equity, is a change in the law in existence when *Roland v. Logan* was decided. If there was the supposed change, it is difficult to conceive that it necessitates a change in the construction fixed upon the statute by that decision. When the law is settled by well defined construction of statutes, and the statutes undergo revision or codification, it would introduce much of confusion and uncertainty, if changes of construction were adopted in the absence of a clear legislative intention to work them; or if a contraction or expansion of the construction of statutes was allowed, because rules and principles of law or of equity which had not been the subject of legislative enactment, were introduced into the revision or codification.

There was no error in sustaining the demurrer to the replication to the statute of limitations.

Let the judgment be affirmed.

[Hayes v. Mitchell.]

## Hayes v. Mitchell.

### *Action for False Imprisonment.*

1. *Power of marshal of Oxford to make arrests.*—Under the act of the General Assembly incorporating the town of Oxford (Pamph. Acts, 1859–60, p. 383.), which was revived and re-enacted by the act of March 1st, 1876 (Pamph. Acts, 1875–6, p. 315), imposing on the marshal of the town the same duties, and conferring upon him the same powers, as are “now conferred by law upon the constables of this State,” the marshal has authority to arrest, without warrant, any person threatening to commit a breach of the peace in his presence.

2. *Power of such officer to imprison after arrest.*—After the arrest of such person, he should not be imprisoned, unless circumstances rendered his imprisonment necessary. But if by reason of the unseasonableness of the hour, or the inaccessibility of the mayor, or other magistrate having jurisdiction, the offender could not be brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or to protect others or their property from lawlessness, the marshal would be authorized to imprison the offender, until he could be properly brought to trial.

3. *Same; when right to imprison a question for the jury.*—In an action for damages brought against the marshal, based on such arrest, and imprisonment made thereafter, the right to imprison is a question for the jury, under appropriate instructions from the court; and a charge to the jury instructing them, that no circumstances would justify the marshal in imprisoning, without the order of the mayor therefor, is erroneous.

### APPEAL from Calhoun Circuit Court.

Tried before Hon. WM. L. WHITLOCK.

This was an action for damages for false imprisonment, brought by Wiley F. Mitchell against J. M. Hayes, and was commenced on 22d September, 1874. The defendant pleaded, in short by consent, (1) not guilty, and (2) “that the defendant was marshal of Oxford at the time of the grievance complained of by plaintiff, and arrested plaintiff, because he was about to commit a breach of the peace in the presence of the defendant at the time of the arrest, and defendant justifies, as such marshal, in making the arrest and imprisonment under such circumstances.” Upon issue joined on these pleas the cause was tried at the fall term, 1880, of said court, and resulted in a verdict and judgment for the plaintiff.

The evidence introduced on the trial showed that on the 25th December, 1873, the defendant was marshal of the town of Oxford, and, as such, arrested the plaintiff without warrant, and put him in the prison or calaboose of said town, where he remained for about two hours, when he was turned loose by



[Hayes v. Mitchell.]

the marshal, under instructions from the mayor. The testimony in reference to the circumstances under which the arrest was made, is somewhat conflicting. The plaintiff's testimony tended to show that, on said day, he met the defendant on the street in said town, and delivered to him a message from certain parties who were confined in the calaboose for violations of town ordinances, to the effect that they wanted a trial and desired to come out of the calaboose; that the defendant then remarked to him that the parties could not get the trial, and that it was none of plaintiff's business, and that he must "hush;" that he replied to this that it was his business, and that he was not in the habit of being made to hush; and that "after some other remarks between them, the plaintiff having a walking-cane in his hand, the defendant caught him by the lapel of the coat and drew his stick on plaintiff, when other words passed, and defendant arrested plaintiff." The defendant's testimony tended to show that the parties who had sent him a message by the plaintiff had been arrested by him on the same day and put in the calaboose for disturbing the peace of the town, and he had been informed that they had threatened to "overturn the town," and they expected to get aid from the plaintiff, and that the plaintiff had promised to aid them in this purpose; that after he had received this information he met the plaintiff on the street in said town, who, in an angry manner, demanded that the defendant should allow said prisoners to be tried and turned loose; that he "asked the plaintiff what business it was of his as to whether the prisoners were turned loose or not," and the plaintiff, replying with an oath, that it was his business, raised his stick to strike the defendant, when defendant arrested him.

The court, at the written request of the plaintiff, charged the jury, that, although the marshal may have the right to arrest, yet he has no right to imprison in the calaboose without an order from the mayor or other judicial officer." To this charge the defendant excepted. This charge, among other rulings of the Circuit Court not necessary to an understanding of the opinion, is here assigned as error.

G. C. ELLIS and W. H. DENSON, for appellant.

WM. M. HAMES, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—Ever since the code of 1852 was adopted, arrests have been authorized to be made by "the sheriff, or any officer acting as sheriff, or their deputies, constable, or marshal,

[Hayes v. Mitchell.]

or policeman of any city or town, acting within their county." Code of 1852, § 3420; Code of 1867, § 3983; Code of 1876, § 4653. Such "officer may arrest any person without warrant, on any day, or at any time, for any public offense committed, or a breach of the peace threatened in his presence," etc.—Code of 1852, § 3425; Code of 1867, § 3994; Code of 1876, § 4664. The town of Oxford in Calhoun county was incorporated by act of the legislature, approved February 21, 1860.—Pamph. Acts of 1859–60, 383. The 8th section of said act declares "that the marshal of said town shall have power to serve all writs and all processes issued from the hands of justices of the peace, both in civil and criminal cases, which may be placed in his hands, and to perform all other duties and powers now conferred by law upon the constables of this State." This act of incorporation was revived and re-enacted, March 1st, 1876.—Pamph. Acts 1875–6, 315. There can be no question that the marshal of Oxford had authority to arrest, without warrant, any person threatening to commit a breach of the peace in his presence. We do not understand this to be denied or controverted. All the rulings excepted to, concede the right in such case to make the arrest. Nor do the rulings controvert the fact that the arrest was justified in this case. The complaint is, that after making the arrest, the marshal, without bringing the plaintiff before the mayor for trial, and without any warrant of arrest, or of commitment, imprisoned him for two hours, and until instructed by the mayor to release him. The ruling was "that although the marshal may have the right to arrest, yet he has no right to imprison in the calaboose without an order from the mayor, or other judicial officer."

Two great and vital principles of Government are to be kept steadily in view, in pronouncing on conduct, such as is brought to view in this record; the liberty of a citizen, and the peace and repose of society. Civil liberty is natural liberty, shorn of the excesses which invade and trench on the equal liberty of others. No one can claim the right to violate the law, and precautionary force is justified, to prevent a greater impending evil. Such force, however, is in its nature remedial, and can be carried no farther than is reasonably necessary to prevent the threatened wrong. Prevention is less hurtful than redress, and when prudently exercised, is not only justified, but is commended of the law. No man can rightfully complain of any encroachment upon personal liberty, which he himself by his lawlessness or violence has rendered necessary for the safety and protection of others. It is liberty as defined by law, not unbridled license, our free constitution guarantees to every man—the humblest, equally with the most exalted.

The rule we declare in this case, must be applicable more or  
VOL. LXIX.

[Hayes v. Mitchell.]

less to all municipalities; particularly to corporations having powers of local government. Possibly in cities and large towns, there is need of greater license in the matter of making arrests, and of detention, without warrant; but it culminates at last in the inquiry, what is reasonably demanded, to guard and protect the public peace. The time of the day or night, the surrounding circumstances, the peaceful or riotous conduct of the public, the necessity real or apparent that the arresting officer shall be on the alert to prevent other acts of violence or lawless disturbance, the accessibility of the mayor or other magistrate, all these enter into the inquiry, what is the duty of the arresting officer. If the mayor or magistrate be not accessible, or if the hour be unseasonable for entering upon the trial, or, if the surrounding circumstances are such that the active duties of the marshal are really or apparently necessary for the preservation of the peace, or the protection of other persons or their property, then it is not the duty of the marshal to neglect these greater interests, that one lawless man may be brought to a speedy trial. Let it be borne in mind, we are dealing with a case, where the arrest is rendered lawful by the misconduct of the person arrested, and not with a case of causeless or wanton arrest. If the arrest in this case was without cause, of course no circumstances could justify the imprisonment.

The ruling in this case was, that no circumstances would justify the marshal in imprisoning, without the order of the mayor therefor. In this the Circuit Court erred. The right to imprison was a question for the jury, under appropriate instructions. There should certainly be no imprisonment, unless the circumstances rendered such imprisonment necessary. If by reason of the unseasonableness of the hour, or the inaccessibility of the mayor or other magistrate having jurisdiction, the offender could not be then brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or, to protect others or their property from lawlessness, then it would not be the duty of the marshal to exhaust his entire energies, in personally detaining the prisoner, to the neglect of all other equally pressing duties. In such case, he would be authorized to imprison the offender, until he could be properly brought to trial.—*Johnson v. Mayor*, 46 Ga. 80; *Boaz v. Tate* 43 Ind. 60; *Scircle v. Neeves*, 47 Ind. 289.

Whether section 4660 of the Code of 1876 bears on this case, we need not inquire, as it is not shown that the prisoner offered to give bond, or, that any magistrate was accessible, before whom he could have been carried.

Reversed and remanded.



## The Security Loan Association v. Lake.

*Bill by Mortgagor to Enjoin Sale under Power, for an Account, and to Redeem.*

1. *Bill to redeem ; what is a sufficient offer to do equity.*—An averment in a bill, filed by a mortgagor, to redeem real estate conveyed by a mortgage, executed to secure a loan made under the by-laws of a corporation organized, as a building and loan association, under the general law, that “orator is still willing, and now offers to pay said association whatever amount he may be justly chargeable with, if any, upon the application to his said case of the terms” of the by-laws under which the loan was made, “and in this respect submits himself to the order and decree of this Hon. Court,” is a sufficient offer to do equity to entitle complainant to relief, if his bill is otherwise sufficient, although no tender is averred, and the money is not brought into court.

2. *Building and loan association ; what by-laws valid.*—By-laws adopted by a corporation organized as a building and loan association, under Art. 7, Chap. 1, Title 2, Part 2, of the Code of 1876, providing that loans of the money in the treasury shall, at stated times, at meetings of its members, be sold at public outcry to the highest bidder ; that the premium bid shall not be less than \$1.00 per share per month ; that the shareholder bidding the highest premium shall be entitled to receive as a loan the full amount of \$200.00 per share for each share held by him ; that the borrower shall pay interest on such loan at the rate of six per cent. per annum, payable monthly, and also the premium at which he bid in such loan, such premium also payable monthly,—are authorized by the statute under which the association was incorporated.

3. *Same ; premiums on loans not usury.*—When the legislature authorized corporations incorporated under the general law, as building and loan associations, to sell loans of its funds to the shareholders at the highest bid, that body thereby authorized such corporations to demand and recover whatever premium the purchaser bound himself to pay ; and the transaction, being thus legalized, is taken out of the operation of the statutes against usury.

4. *Same ; how member can withdraw and have loan cancelled.*—A by-law of such corporation, providing, that a shareholder, who has obtained a loan, may withdraw from the association and have his loan cancelled, by payment to the association of the amount of the loan, less the amount of money which he has paid in as monthly installments on the stock held by him, reserves to the shareholder a privilege which he may exercise or not, at his pleasure. If he elect to exercise it, he must comply with the terms thereby prescribed, which were voluntarily assumed by him, when he obtained the loan. Under this by-law, the shareholder is entitled to have his loan credited with the money which he has paid in as monthly installments on his stock, but not with money which he has paid for and on account of the premiums at which he bid in his loan.

5. *Usury ; how pleaded.*—A party who has made usurious payments on a debt and seeks, by bill in equity, to obtain credit for such payments, must distinctly and correctly set forth in the bill the terms and nature of the usurious agreement and the amounts of the payments which he has made thereon. Under this rule, the averments of the bill in this cause are wholly insufficient to raise the question of usury.

6. *Bill to enjoin sale under power ; when without equity.*—A bill filed

## [The Security Loan Association v. Lake.]

by a mortgagor, seeking an account of the amount due on the mortgage debt, and an injunction of a sale of the property conveyed by the mortgage, under a power therein contained, is without equity, when it does not show, that the mortgagee claimed more than was due on the debt; or that the accounts are so complicated, that the parties can not state them and ascertain the amount due; or that the mortgagee is making, or attempting to make, a fraudulent, or oppressive use of the mortgage, or of the power of sale contained therein.

## APPEAL from Mobile Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The bill in this cause was filed by Thomas H. Lake against The Security Loan Association, a corporation, and Leslie E. Brooks; and the case made thereby is substantially as follows: The defendant corporation was organized in 1873, under the Code, as a building and loan association, the capital stock of which was divided into shares of \$100 each. In April, 1876, the complainant, Lake, being the owner of twenty-five shares of the stock of said corporation, upon which nothing was then due, applied for and obtained a loan or advance of \$5,000, which was made to him by the association "under the terms, conditions and requirements and reservations of its charter, constitution and by-laws governing loans to the holders of stock in said association," and at a premium of one dollar per month per share, in addition to interest at the rate of six per cent. per annum, both payable monthly. Copies of the constitution and by-laws of the corporation are made exhibits to the bill, and the provisions thereof touching the questions passed on by the court, are, substantially as follows: By the constitution it is provided, that each stockholder, for each share of stock held by him, shall be entitled to a loan of \$200, and no more, upon such terms and under such regulations as may be prescribed by the by-laws. In the by-laws it is provided, that "the amount of money in the treasury each month shall, at the monthly meetings of the members, be sold at public outcry to the highest bidder or bidders. The bids shall be at the rate of not less than one dollar per month per share, and the stockholder who shall bid the highest premium over and above the said minimum of one dollar per share per month, shall be entitled to receive as a loan, the full amount of two hundred dollars per share, for each share held by him, without deduction." And further, that such loan shall be secured by mortgage on real estate, or such other security as the board of directors may deem sufficient; that the borrower shall keep the improvements on the mortgaged premises insured at his own expense, for the benefit of the association, and shall pay the taxes thereon; that he shall pay interest on the loan obtained by him at the rate of six per cent. per annum, payable monthly, in addition to the premium at which he bid in the loan, which is also payable monthly, and the monthly in-

[The Security Loan Association v. Lake.]

installments on his stock; and that if default be made in the payment of monthly installments, interest or premiums for ninety days, the whole loan shall become due and payable, and the association may compel payment thereof by the sale of the mortgaged property. It is also provided in the by-laws, that each member, for every share of stock held by him, shall pay an initiation fee of one dollar, and thereafter monthly an installment of one dollar, until the installments, interest and premiums on loans and other receipts shall be sufficient to divide among the shares the sum of two hundred dollars per share: "*Provided*, that not more than one hundred dollars shall be required to be paid as installments upon each share of stock;" and that when such receipts have accumulated a sum sufficient for the purpose, each shareholder, who has received a loan, shall upon the surrender to the association of one share of stock for each two hundred dollars borrowed by him, be entitled to have his mortgage cancelled, or returned to him; and any shareholder, upon the surrender to the association of stock upon which no loan exists, shall for each share so surrendered, receive the sum of two hundred dollars. The by-laws further provide, that any member who, having received a loan, desires to withdraw from the association, may have such loan cancelled, by payment to the association of the amount of the loan, less the full amount of money which shall have been paid in as monthly installments on stock by such stockholder exclusive of the initiation fee.—(Sec. 4, Art. 2.)

The complainant, to secure the loan or advance obtained by him, executed to Leslie E. Brooks, trustee, a mortgage or deed of trust on certain real estate in Mobile, a copy of which is made an exhibit to the bill. The mortgage contains a power of sale, on default in the payment of any part of any one of the monthly stock installments, interest or premiums, as they fall due; and its terms are in strict conformity with the provisions of the constitution and by-laws of the association. The bill avers, that the complainant regularly paid this sum of \$25, the monthly installments on his shares of stock, and the additional sum of \$50 monthly, as interest and premiums on his said loan, up to the 5th October, 1881, at which time the payments he had made upon his shares of stock, amounted to \$100 per share, and in the aggregate to \$2500; that the payments were all made monthly in advance of the accrual of interest upon said loan, and that thereby the interest and an additional six per cent. on the loan, were paid up to the 10th November, 1881; that no payments were made by him to the association after the 5th October, 1881; and that he has paid all insurance and taxes on the mortgaged premises; that he has caused careful calculation to be made of the amount due from him on the loan, after cred-



[The Security Loan Association v. Lake:]

iting thereon "the payments heretofore made by him as hereinbefore stated, and the amount due thereon, on 10th November, 1881, was \$399.06; that he has applied to withdraw from said association and to have his said loan cancelled, under the by-laws thereof, and for this purpose has offered to said association his fully paid up stock of the value of \$2500, and to pay the difference between that value and the amount due on his said loan; and that not being disposed to be close or illiberal in his settlement, he has offered \$500 in payment of said difference, a sum in excess thereof, if the said payments made by him monthly were applied monthly, as they were made, to the said loan; that "he is still willing and now offers to pay said association whatever amount he may be justly chargeable with, if any, upon the application to his said case of the terms of said by-law, Section 4, Article 2, and in this respect submits himself to the order and decree of this Hon. Court;" that said association has refused his said application, and that it required that he pay it the sum of \$1,000, "with cost, interest and expenses," in addition to the surrender of his stock, which demand, the bill charges, is inequitable and unjust. It is also averred in the bill, that the trustee has advertised the property conveyed by the mortgage, for sale under the power therein contained, and that he would sell the same thereunder, unless he be enjoined therefrom. The prayer of the bill is for an account of the amount due on the loan, and of the amount which the complainant would have to pay, upon the surrender of his stock, in order that he may withdraw from said association under the by-laws thereof, and for general relief; and also, that the sale of the mortgaged premises be enjoined, until the court, by its decree, has ascertained the amount which the complainant should pay on said loan. The injunction was issued in accordance with the prayer of the bill. The defendants separately demurred to the bill, and the defendant corporation also answered under oath, and moved to dissolve the injunction upon the demurrer and answer, and also for want of equity, and also moved to dismiss the bill for want of equity. The cause was submitted for decree on the motion to dissolve the injunction, on the motion to dismiss for want of equity, and also upon the demurrer. Upon the hearing the Chancery Court rendered a decree overruling both motions and also the demurrer; and this decree is here assigned as error.

H. PILLANS, for appellant.

P. HAMILTON and COBBS & TOMPKINS, *contra*.

STONE, J.—The bill in this case was filed by Lake, the

[The Security Loan Association v. Lake.]

mortgagor, to redeem real estate from under a mortgage, executed in 1876. The mortgagor is in possession, and a difference has arisen between him and the mortgagee, as to the amount due on the mortgage. The mortgagor avers that the sum due is only about four hundred dollars, but that he offered to pay five hundred dollars, which was refused by the mortgagee. The mortgage creates a trustee, and contains a power of sale, under which the property has been advertised, and will be sold, unless restrained by injunction. An injunction was obtained.

The bill prays for an account, and that complainant be permitted to redeem. It does not aver a tender, and does not bring the money into court. It contains this clause: "Your orator is still willing, and now offers to pay said association whatever amount he may be justly chargeable with, if any, upon the application to his said case of the terms of said by-law, section 4, article 2, and in this respect submits himself to the order and decree of this Honorable Court." This is a sufficient offer to do equity to entitle the complainant to relief, if his bill is otherwise sufficient.—*Rogers v. Torbut*, 58 Ala. 523.

The defendant is a private corporation, chartered under Article 7, Chapter 1, Title 2, Part 2, commencing with section 1937 of the Code of 1876. It is what, in the Code and in common parlance, is called a building and loan association, having some features of a mutual aid enterprise.

The answer denies the averment that the sum of four hundred dollars is all that is due on the mortgage, and avers that near eleven hundred dollars is due; sets up that to settle the controversy, it had proposed to accept one thousand dollars in full discharge of the mortgage debt, and that Lake had refused to pay it. So the chief contention is, as to the amount due from Lake to the corporation.

The ground on which the bill claims the right to redeem, on the basis of four hundred dollars due, is, that under the terms of the contract evidencing the loan, the complainant, borrower, bound himself to pay as interest for the forbearance of the moneys, at the rate of six per cent. *per annum*, payable in monthly installments, or, one-half of one per cent. a month, and that he was to pay no higher rate of interest; and the bill then avers that Lake, the borrower, had in fact paid an additional half per cent. every month since the loan, being twenty-five dollars additional paid every month for a period of nearly five years. These several additional payments the bill claims should be entered as credits on the principal of the loan, at the times they were severally made; and in this way, it is contended that the mortgage debt was reduced to four hundred dollars when the bill was filed. The claim and argument rest on the following postulates: That the sum borrowed was five thousand dol-

[The Security Loan Association v. Lake.]

lars, and Lake has, all the while, made monthly payments of fifty dollars each, which paid the accruing interest of one-half of one per cent., equal to six per cent. *per annum*, the agreed interest, and left a surplus to be applied to the reduction of the principal, which would, and did, increase monthly, as these several payments reduced the interest-bearing debt. Then claiming a reduction of twenty-five hundred dollars, the cost and value of complainant's twenty-five shares of paid up stock, the conclusion is claimed, that only four hundred dollars is required to perfect the redemption; and all this is claimed under the terms of the contract, by which the loan was obtained. If this be true, then complainant, with the exception of the loss of interest on the stock installments or calls, will have had the use of the money borrowed at the low rate of six per cent. interest. Is this the true construction of the contract?

Corporations such as the present one are of somewhat modern origin. Their purpose is not banking, neither are they manufacturing or trading corporations. They have some elements of mutual aid, and if properly organized, and prudently and faithfully conducted, they furnish a safe and profitable depository for surplus earnings; notably, for small surplus earnings. Under their workings, many small sums, contributed by the many shareholders, are brought together monthly, and an aggregate sum is thus gathered in, which, passing out immediately to one or more shareholders, furnishes a capital, or stock in trade, sufficient for permanent and profitable investment. Each month this process is repeated, furnishing capital, or stock in trade, for other shareholders. Thus the working is continued from month to month, until a sufficient sum is collected and disbursed to pay off and cancel all the shares of stock, at the value fixed in the articles of incorporation. The lettings of the moneys are frequently called loans, but they are not strictly loans. The principal is never to be repaid as principal. In truth, it is never to be repaid at all. It is an advance payment by the corporation of the agreed value, the shares owned by the bidder are to represent, and have, at the final completion of the enterprise and the dissolution of the corporation. It is the policy of the association that the funds received on stock calls should not remain idle, and hence they are employed in advance liquidation of the demands the shareholders are severally to have at the dissolution. In anticipating payments of shares, the payments are at the rate of two hundred dollars per share. But all payments can not be made at the same time. Hence the competition. Hence the sale to the highest bidder.—Code of 1876, § 1943, subd. 6. Those who obtain the first advance, first realize the increased value of their shares, and so on, until the enterprize runs its course and winds itself up. Sharehold-



[The Security Loan Association v. Lake.]

ers pay for their shares, in stock calls, one hundred dollars per share, in installments of one per cent. a month, running through one hundred months, equal to eight years and four months. Discounting interest from the deferred payments, we have an average of four years and two months in interest saved. This would reduce the cash cost of the shares to less than seventy-three dollars. Now, if those who receive the early advance payment of their shares, like the shareholders who are not paid in advance, are required to pay only the stock calls, it will be readily seen how inequitably such method of payment would work. Hence it is, that those receiving payment in advance of others, are required to pay for this privilege whatever premium they bid and bind themselves to pay. All such payments go to augment the fund for the payment of other shareholders, and accelerate final completion of the purposes of the corporation—its final liquidation and dissolution.

The mortgage executed by Lake and wife, made an exhibit to the bill, characterizes the transaction we are considering as a permanent loan. How permanent, if it was to be repaid? It makes no provision for its repayment. The defeasance in the mortgage is expressed in the following language: "If the said Thomas H. Lake, his heirs, executors and administrators shall pay or cause to be paid unto the said Security Loan Association monthly, at the time prescribed in the by-laws of said association, the sum of twenty-five dollars installment on said stock on which said loan was obtained, and the further sum of fifty dollars monthly on the same day, as interest and premium on said loan; and shall regularly continue to make such monthly payments, until all the receipts of said association shall amount to a sum sufficient to divide among the shares the amount of two hundred dollars per share, . . . then these presents shall be void." It is nowhere shown that the terms of the mortgage are in any respect different from the terms of the contract by which Lake purchased the advance on his stock. The terms are in strict conformity with the constitution and by-laws of the association, as made an exhibit to the bill; and the terms and provisions of the constitution and by-laws on this subject are fully authorized by the statute.—Code of 1876, § 1943, subd. 6; *Montgomery Mutual Building and Loan Association v. Robinson*, ante, p. 413; *Merrill v. McIntire*, 13 Gray, 157.

If it was intended in this bill to raise the question of usury in the alleged loan, the averments are wholly insufficient for that purpose.—*Munter v. Linn*, 61 Ala. 492; *Vaughan v. Marable*, 64 Ala. 60; *Brown v. Heard*, 3 A. K. Marsh. 390; *N. O. Gaslight Co. v. Dudley*, 8 Paige, 452; *Curtis v. Masten*, 11 Paige, 15; *Waterman v. Curtis*, 26 Conn. 241. Nor do we

[The Security Loan Association v. Lake.]

think the facts justify a charge of usury when considered in reference to the statute.

In *Montgomery Mutual Building and Loan Association v. Robinson, supra*, we considered and construed language in a special act of incorporation, not distinguishable in substance from that found in the general law under which this association was incorporated, and we then held that although the premium bid and promised was in excess of the legal rate of interest, it was nevertheless recoverable. The legislature had declared what was usury and its consequences, and when that body authorized such associations to sell loans of its funds to the shareholders at the highest bid, they thereby authorized them to demand and recover whatever premium the purchaser bound himself to pay, and thus legalized the transaction. That which the legislature authorizes to be done, can not be a violation of the law. The statute in question in effect declared that such transactions were taken out of the operation of the statutes against usury.

The by-laws of the Security Loan Association recognize several methods by which shareholders can cease to be such; some relating to shareholders who have purchased an advance or loan, and others to such as have not. Article 2, section 5 of the by-laws declares the rules to be observed, when a member of the association dies. Article 2, section 3 declares in what manner members may withdraw, who are not indebted, and who have not taken a loan. Article 4, section 3, declares when stock is forfeited for non-payment of dues and fines. Article 5, section 3, relates to the transfer of stock. None of these provisions bear on the question before us, for Lake, the complainant in this case, purchased a loan or advance on his stock; and the question is, on what terms can he obtain a release of the mortgage security he gave when he obtained the money.

When the shareholder has purchased a loan on his shares, or anticipated their enjoyment, the by-laws furnish two modes, and only two, by which he can release himself and his property from the liability and encumbrance he incurs when he takes the loan. The first, found in article 2, section 4, prescribes what he shall do when he "desires to withdraw from the association." When this mode is pursued and carried out, he ceases to be a shareholder, ceases to be a member of the association, and no longer owns any interest in, or rests under any liability to the corporation. This he accomplished "by payment to the association of the amount of the loan, less the full amount of money which shall have been paid in as monthly installments on stock by such stockholder." It would seem that there should not be much difficulty in interpreting this language. The stockholder must pay back the amount of the loan; not in full,

[The Security Loan Association v. Lake.]

he is entitled to a credit or discount. The by-law declares of what that credit or discount shall consist. It is "the full amount of money which shall have been paid in monthly installments on stock." The constitution and by-laws clearly show what is meant by monthly installments on stock. It is the payment of one dollar per month on each share of stock subscribed for one hundred months. It extends no farther, for nothing else paid can come under the denomination of monthly installments on stock. It can not include premiums bid, for they are always called premiums, and never called installments. They are paid monthly, it is true, and at the same time the installments are paid, but the provision for their payment is in the following language: "To be paid unto the said Security Loan Association monthly, at the time prescribed in the by-laws of the association, the sum of twenty-five dollars installments on said stock on which said loan was obtained, and the further sum of fifty dollars monthly on the same day, as interest and premium on said loan." It is just as compatible with the mortgage to call monthly payments of interest installments, as it would be to so characterize the monthly payment of the premium, at which Mr. Lake became the purchaser. So the monthly calls on stock subscribed are called installments in the constitution, article 4, and in the by-laws, article 2, sections 1, 2, 3, 4, 6; article 3, section 7; article 4, sections 2 and 3. The interest and premium are called interest and premium whenever mentioned.

This section of the by-laws construed, and necessarily construed as stated above, imposes what seem to be onerous terms on the shareholder who wishes to withdraw from the association. Particularly so, when he seeks to withdraw, after paying many installments on his stock, and, as in this case, after he has made many monthly payments of interest and premium. But the right to withdraw is a privilege reserved, not a duty imposed. He may exercise it or not at his pleasure. If he elect to exercise it, he must comply with the terms prescribed in the by-laws and voluntarily assumed when he executed the mortgage. As we have said above, the legislature has relieved this transaction from the imputation of usury, in the matter of premium promised in the purchase of the advance or loan.

The other mode by which a borrower or purchaser of an advance can release himself and property from liability therefor, is prescribed in article 5 of the by-laws. It is by procuring a substitute to take his place, and making good the difference in the premium the money may command on second sale. When this course is pursued, the shareholder remains a member of the association, unless he sells his stock. It is not contended



[The Security Loan Association v. Lake.]

this case falls within this provision, and we do not consider its terms. They appear to be plain and simple.

Under the principles stated above, the complainant fails to show that the mortgagee claimed more than was due to it. There is not enough in the bill to show that the accounts are so complicated, that the parties can not state them and ascertain the amount due. And there is a failure to show that the mortgagee is making or attempting to make a fraudulent or oppressive use of the mortgage, or of the power of sale contained therein. In such case, does the bill contain equity? And if so, is there any reason shown why the injunction should have been granted?

Jones, in his excellent treatise on mortgages, Vol. 2, § 1801, employs this language: "Generally, the purpose for which the power of sale is given, being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by his contract bound to exercise the necessary promptness in fulfilling it; and can not complain of a legitimate exercise of the power. If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale or will set it aside after it is made. Of course, so long as the creditor exercises only his legal right, although this be contrary to the wishes and interest of the mortgagor, the court will not interfere to enjoin a sale." In section 1804 is this language: "Courts of equity will interfere by injunction to prevent a sale under a power in a mortgage or trust deed, when, by reason of fraud, want of consideration, or otherwise, the collection of the debt would be against conscience, and the sale would work a great and irreparable injury. To warrant this interference the complainant must allege specifically the grounds on which the application is based. General statements and inferences from facts are not sufficient." Section 1805: "The court will enjoin a sale only when the petitioner's rights are clear, or free from reasonable doubt. He must show also a good reason for asking the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not merely that he might adopt a different remedy."—*Struve v. Childs*, 63 Ala. 473; *Vechter v. Brownell*, 8 Paige, 212; *Powell v. Hopkins*, 38 Md. 1; *Meysenburg v. Schlieper*, 46 Mo. 209; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Van Bergen v. Demarest*, 4 Johns. Ch. 37; *Wilkins v. Gordon*, 11 Leigh, 547; *Crenshaw v. Seigfried*, 24 Grat. 272; *Kornegay v. Spicer*, 76 N. C. 95.

The present bill fails to come up to this rule, and fails to show a ground for equitable relief. Whether it can be so

[Mohon v. Tatum, Guardian.]

amended as to give it equity, we can not certainly know; and coming before us simply on interlocutory rulings by the chancellor, we can not finally dispose of it. The appeal is prosecuted from the decretal order of the chancellor overruling the demurrer and refusing to dissolve the injunction. The cause is still pending in the court below.

The demurrer should have been sustained, and, unless the complainant offer an amendment to his bill, showing the account is so complicated that the parties can not ascertain the amount due, then the bill should be dismissed. To make such amendment sufficient, it must set forth the facts which show the complication, or it must show some other special exceptional equity. If not so amended, the injunction must be dissolved, and the bill dismissed.

Demurrer to the bill sustained, at the costs of the appellee. Remanded for further proceedings in accordance with this opinion.

## Mohon v. Tatum, Guardian.

### *Application to Probate Court to Vacate and Set aside Sale of Land made by Guardian.*

1. *Guardian and ward; power of guardian to sell land.*—The probate court has jurisdiction to order the sale of real estate belonging to minors, on the application of the guardian, only in the following cases: (1) For the support and education of the ward (Code, § 2780); (2) for reinvestment of the proceeds of sale (*Ib.* § 2785); and (3) for distribution among joint owners (*Ib.* § 3514).

2. *Same; when sale of land by guardian void.*—An application to the probate court by a guardian of minors to sell land belonging to his wards, which avers, as the only ground therefor, that he “believes it to be to the interest of said minors that the land of said estate be sold for distribution among the said [minors], or to their guardian for their use, as the lands are not in a state of cultivation, and therefore of no benefit to said minors,” is fatally defective, and a sale made thereon is void.

3. *When husband should not join in application by wife to set aside sale in probate court.*—An application to the probate court to set aside, as void, a sale of land belonging to the statutory separate estate of a married woman, made by her guardian before her marriage, should be in the name of the wife alone, and not in the name of herself and husband.

4. *Same; when application will be dismissed for misjoinder of parties.* Where an application is made in the probate court by both husband and wife to set aside, as void, a sale of land belonging to the statutory separate estate of the wife, made by her guardian prior to her marriage, and is afterwards amended so as to show that the wife applied by a third party, as her next friend, the husband still remaining a party, there is a misjoinder of parties plaintiff, and the application should be dismissed.

## [Mohon v. Tatum, Guardian.]

5. *Same ; when husband not presumed as suing as next friend of the wife.* In such case, a third party having been introduced by the amendment as next friend of the wife, the presumption which is sometimes made, that the husband, when joined as party plaintiff with his wife, sues merely as her next friend, is rebutted, and can not prevail.

6. *When court need not tender an opportunity to amend.*—Where there is a demurrer, or motion to dismiss for misjoinder or non-joinder of parties plaintiff, it is not required that the court should expressly tender an opportunity to amend.

7. *Right to amend must be claimed in lower court.*—The right of amendment is a privilege which must be claimed in opportune time in the lower court, and can not be raised in this court for the first time.

## APPEAL from Cherokee Probate Court.

Tried before Hon. R. R. SAVAGE.

This was an application by petition filed by Adelia Mohon, a married woman and a minor, and Alex. Mohon, her husband, on the 8th of April, 1881, to vacate and set aside a sale of land made by John W. Tatum, as the guardian of the said Adelia, under the decree of said court, on the 26th day of November, 1877, on the ground that the court had no jurisdiction to decree the sale of the land, and that the sale was void. It appears from the petition that John W. Tatum, on the 17th May, 1873, was appointed by said court the guardian of the said Adelia and others, who were minors, and that the lands sold belonged jointly to his wards, and that the said Adelia held her interest therein as a part of her statutory separate estate. For the purposes of this report, the proceedings for the sale of the land, as averred in the petition, are sufficiently stated in the opinion. On the hearing, the petition was amended so as to show that the petitioner, Adelia Mohon, filed the petition by one W. W. Mohon as her next friend. The said John W. Tatum and one W. H. Ballard, who were purchasers at the sale, moved to dismiss the petition, on the ground, among others, that the husband was improperly joined therein as a party plaintiff. The motion was sustained and the petition dismissed. It does not appear from the record that any motion was made in the lower court to amend so as to cure the misjoinder of parties plaintiff.

The ruling of the Probate Court above noted is here assigned as error.

WALDEN & SON, and WATTS & SONS, for appellants.—(1). The power of the Probate Court to order the sale of lands belonging to minors is strictly statutory, and no order of sale of such lands can be made except in the instances authorized by statute. *Hudson v. Helmes*, 23 Ala. 585; 51 Ala. 514. (2). The petition of the guardian in this case for the sale of his wards' lands does not set forth any *facts* which would authorize the Probate Court to take jurisdiction thereof, and decree a sale. It is clear from the petition that the court acquired no jurisdiction to de-



[Mohon v. Tatum, Guardian.]

cree the sale of the land; and the decree and the sale made thereunder are void. (3). Any person having an interest in the lands may make an application to vacate and set aside a void sale.—*Dryer v. Graham*, 58 Ala. 623, and authorities there cited; *Lee v. Davis*, 16 Ala. 516. The lands belonged to Mrs. Mohon and her brothers and sisters, and she unquestionably had such an interest as authorized her to make the application. The lands belonged to her as her statutory separate estate, and, as such, the legal title vested in her husband, as her trustee; he was entitled to the rents, issues and profits of her interest, and he was also entitled to possession and control of her interest. Both the interests of the wife and husband were prejudiced by the sale, and, therefore, both and each could make the application.—*Lee v. Davis*, *supra*. (4). But if it should be held that the husband and wife can not join in such application, then the court below should have treated the application as that of the wife, by her husband, as her next friend.—*Michan v. Wyatt*, 21 Ala. 813; *Gerald v. McKenzie*, 27 Ala. 166.

JAMES H. SAVAGE, *contra*.—(1). Property held by tenants in common or joint owners may be sold for distribution, when the same can not be equitably divided, although some of the parties in interest may be minors.—Code of 1876, § 3120. Such property may be sold on the application of any one interested, or by the guardian or lawful representative of such an one.—*Ib.* § 3121 *et seq.* (2). The court had jurisdiction to order the sale. *DeBardelaben v. Stoudenmire*, 48 Ala. 643; *Hudgens v. Jackson*, 51 Ala. 514. (3). Only sales that are void can be set aside at a subsequent term.—*King v. Kent*, 29 Ala. 542; *Johnson v. Johnson*, 40 Ala. 247; *Satcher v. Satcher*, 41 Ala. 26. (4). Application to vacate an order of sale must be made by some one interested.—*DeBardelaben v. Stoudenmire*, *supra*. And such party must show the interest he has.—*Vincent v. Daniel*, 59 Ala. 602. (5). The wife alone can sue for the *corpus* of her statutory separate estate.—*Pickens v. Oliver*, 29 Ala. 528; *Carter v. Owens*, 41 Ala. 217. The petition, having been filed by the husband and wife, was, therefore, properly dismissed.

SOMERVILLE, J.—The sale of the wards' property in this case, which is sought to be vacated by motion in the Probate Court, was clearly void for want of jurisdiction, and being void on its face, could be set aside at a subsequent term of the court.

The Probate Court can exercise its statutory power of *selling* real estate belonging to minors only in the following cases, on application of the guardian: (1) For the *support and education* of the ward—Code, 1876, § 2780; (2) for *reinvestment* of the

[Mohon v. Tatum, Guardian.]

proceeds—Code, § 2785; (3) for *distribution* among joint owners—Code, § 3514.

The application for sale which was originally made by the guardian was obviously intended to be made for distribution only, under the provisions of sections 3514 and 3515 of the Code. Such a petition is required to allege that “such property [sought to be sold] *can not be equitably partitioned or divided without a sale of the same*” (§ 3515), and this is, under the uniform rulings of this court, a jurisdictional allegation, in the absence of which, at least in substance, the Probate Court possesses no lawful authority to order a sale, and any sale made under such arrogated authority would be absolutely void. The averment of the petition here assailed is as follows: “Your petitioner *believes it to be to the interest* of said minors that the land of said estate be *sold for distribution* among the said [minors], or to their guardian for their use, as the lands are not in a state of cultivation, and therefore of no benefit to said minors.” Then follows a description of the lands, and a prayer asking for an order of sale. It needs no argument to show the insufficiency of this allegation. It plainly is wide of compliance with the requirement of the statute. The petition of the guardian, therefore, being fatally defective, the sale in question was void.

The motion to set aside the sale could be made by any person in interest, as distinguished from a mere stranger. It could certainly be instituted by Mrs. Mohon, as the property sold was her statutory separate estate.—*Dryer v. Graham*, 58 Ala. 623; *Freeman on Ex.* § 305.

She was, however, the *only party* who should have been plaintiff in the motion. It was in the nature of a suit for her undivided interest in the lands which had been sold, and related to the *corpus* of her separate estate created by statute. In such cases the wife should sue and be sued alone, the husband not being a proper party plaintiff.—Code, 1876, § 2892; *Pickens v. Oliver*, 29 Ala. 528.

The petition was for the latter reason properly dismissed, there being a misjoinder of parties plaintiff. It was originally instituted in the name of the husband and wife. An amendment was allowed on the trial so as to show that the wife, who was a minor, sued by her *next friend*, one W. W. Mohon. To the allowance of this amendment, there was, in our judgment, no legal objection, it being fully authorized by the statute.—*Berry v. Ferguson*, 58 Ala. 314; *Fennell v. Tucker*, 49 Ala. 453. It is insisted, however, that the husband was a party plaintiff in form merely and not in substance, and as he claimed no relief for himself, but only for the wife, he should have been regarded as her next friend, and that the suit should have been allowed to proceed in this form. This, it may be admitted, is some-

[Stewart v. Beard.]

times the practice of the chancery courts, and it may be that it would be permissible in a proper case in the probate court. *Michan v. Wyatt*, 21 Ala. 813; *Gerald v. McKenzie*, 27 Ala. 166. But in this case, an amendment had already been made introducing the name of a *prochein ami*, and the reason of the rule invoked could, therefore, in no manner apply.

It is further urged that the petition should not have been dismissed without allowing the petitioner an opportunity to amend. Where there is a demurrer, or direct motion to dismiss for misjoinder or non-joinder of proper parties plaintiff, it is not required that the court should expressly tender the opportunity of amendment. The right of amendment is a privilege which must be claimed in opportune time, and, in the absence of any motion or suggestion shown by the record to have been made to this end in the court below, this point can not be raised for the first time in the appellate court. The petitioner should have requested permission to amend so as to conform the petition to the requirements of the statute regulating the matter of parties.—*Brock v. S. & N. Ala. R. R. Co.*, 65 Ala. 79; *Bishop v. Wood*, 59 Ala. 253, 258.

Affirmed.

## Stewart v. Beard.

### *Statutory Real Action in Nature of Ejectment.*

1. *Conveyance of land ; execution of.*—A conveyance of lands, not acknowledged by the grantor as required by law, must be attested by at least one witness, and, if the grantor signs by mark only, by two witnesses; and in either case the attesting witness must be able to write, and must in fact write his own name.

2. *Same.*—A deed, signed by the grantor, but not acknowledged, and purporting to be attested by two witnesses, one of whom signed by mark only, and the name of the other was written by the grantor, is insufficient to pass the legal estate, and is incapable of recognition in a court of law as a muniment of title.

APPEAL from Etowah Circuit Court.

Tried before Hon. LEROY F. BOX.

This was a statutory real action in the nature of ejectment, brought by Eli B. Beard, the appellee, against Mary A. Stewart, the appellant, and was commenced on 13th February, 1879. The appellee claimed title under an instrument of writing, purporting to be a deed conveying to him the land in controversy, and bearing date, December 14th, 1866. The facts



[Stewart v. Beard.]

touching the execution of this instrument are sufficiently stated in the opinion. When it was offered in evidence by the appellee, the appellant objected, on the ground that it was not shown that it had been executed as required by the statute. Her objection was overruled, and the instrument allowed to be read to the jury as evidence, and she excepted. Exceptions were also reserved to other rulings of the Circuit Court, but the view taken of the case by this court renders it unnecessary to set them out.

The ruling above noted was one of the assignments of error.

J. L. CUNNINGHAM, M. J. TURNLEY and AIKEN & MARTIN, for the appellant, after discussing other questions raised by the record, but not passed on by the court, contended that the deed, not having been attested by one witness who could write his name, nor acknowledged, was not executed as required by the statute, and was improperly admitted as evidence, citing Code of 1876, § 2145: *Goodlett v. Hansell*, 56 Ala. 346; *Hendon v. White*, 52 Ala. 599; *O'Neal v. Robinson*, 45 Ala. 526; *Ansley v. Nolan*, 6 Port. 379; *Thrash v. Johnson*, 6 Port. 458.

DENSON & DISQUE, *contra*. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—The plaintiff (now appellee) deduced title, right of entry, and of possession in and to the premises in controversy, from an instrument purporting to be a conveyance, executed by Sutton and wife. The execution of the instrument was not acknowledged and certified in the mode prescribed by the statute for the acknowledgment of conveyances. It contains the usual attestation clause, and purports to have been attested by one McMahan, signing by a mark only, and by one Anderson, writing his name. The grantor Sutton signs by writing his name; the wife by making her mark. The statute (Code of 1876, §§ 2145–6) requires that conveyances for the alienation of lands must be signed at the foot by the contracting party, or his agent having written authority; “or if he is not able to sign his name, then his name must be written for him, with the words ‘his mark’ written against the same, or over it; the execution of such conveyance must be attested by one, or where the party can not write, by two witnesses who are able to write, and who must write their names as witnesses.”—Code of 1876, § 2145. Since the enactment of this statute, conveyances for the alienation of lands, not attested by witnesses as it requires, or not acknowledged and certified by an officer having authority to take and certify the acknowledgment of conveyances, have been uniformly pronounced in-

[Stewart v. Beard.]

sufficient to pass the legal estate, and incapable of recognition in a court of law as a muniment of title.—*Hendon v. White*, 52 Ala. 599; *Goodlett v. Hansell*, 56 Ala. 346; *Sharpe v. Orme*, 61 Ala. 263; *Lord v. Folmar*, 57 Ala. 615.

The attestation purporting to be made by Anderson, was not his act. At the execution of the deed he could not write, and without his request or assent, his name was written as a witness by the grantor, Sutton. The attestation of any instrument must be, and is, of necessity, the act of the witness, and not of the grantor or other party to the instrument. When his name is not written by himself, but by a party to the instrument, it is not an attestation. On proof of that fact, it would not be necessary to call him to prove its execution, or to account for his absence before introducing other evidence of execution.—1 Greenl. Ev. § 569 *a*. But independent of that consideration, a conveyance of lands is not so executed, as that the legal estate will pass, unless, when the grantor writes his name, it is attested by a witness able to write, and who in person writes his name; or if the grantor sign by a mark, by two witnesses writing their names. This is the plain requisition of the statute, intended as a security against clandestine conveyances, and to furnish enduring evidence of the title to lands. The statute contemplates that the grantor may sign the conveyance by writing his name, or if not able to write, by making his mark. Whether signed in the one or the other mode, if its execution is not acknowledged and certified as is authorized, there must be an attestation by one, or by two witnesses. When the grantor signs his name, the attestation of one witness is sufficient; when he signs by a mark, the attestation of two witnesses is required. Either attestation must be by a witness, or witnesses, *able to write, and who write their names*. A mark may satisfy the requisitions of other statutes, less explicit and emphatic in their terms, employing only such general words as “*sign*,” or “*subscribe*.” It would be a violation of the words, and go far to defeat the policy of this statute, if it were construed as sanctioning an attestation by a witness who makes his mark only. This instrument not having been attested, or acknowledged, as required by the statute, the Circuit Court erred in overruling the objection to its admissibility as evidence. This will probably be decisive of the case, and it is unnecessary to consider the other assignments of error.

Reversed and remanded.

[Rich v. Thornton.]

**Rich v. Thornton.***Attachment for Advances.*

1. *Courts of record ; their power over judgments.*—The power of a court of record over its judgments during the term at which they are rendered, is very large ; and it rests within the sound discretion of the court to set them aside when satisfied that injustice has been done, or that they have been inadvertently or improvidently rendered.

2. *Same.*—It is not irregular for a court to set aside during the term a judgment rendered by it, dissolving an attachment and dismissing the suit, without notice to the defendant ; as it can not be assumed that the want of notice was prejudicial to him, the court having the authority to set aside such judgment despite any objections he could make.

3. *Attachment ; rule to show cause why it should not be dissolved.*—An attachment having been issued on a cause of action, for which the issue of the process is not authorized by law, the mode of reaching the irregularity is by a rule for the plaintiff to show cause why the attachment should not be dissolved ; and on the hearing of the rule the court should receive evidence showing the real nature and character of the demand sought to be enforced, in support, or for the discharge of the rule.

4. *Exception to rejection of evidence ; when can not be sustained.*—An exception to the rejection of evidence can not be sustained, unless it is shown that the evidence was legal and relevant ; and if that be not shown, the presumption will be made, if necessary to support the judgment of the lower court, that it was rejected because illegal or irrelevant.

5. *Attachment ; refusal to quash not revisable.*—The refusal of the lower court to quash an attachment for defect in the affidavit, is not revisable on appeal.

6. *Evidence ; when written instrument self-proving.*—Where the execution of a written instrument, which is the foundation of the suit, is not denied by sworn plea, it is, under the statute, admitted of record by the defendant, and must be received in evidence without proof of its execution.

APPEAL from Cherokee Circuit Court.

Tried before Hon. LEROY F. BOX.

This was an attachment commenced by Robert S. Thornton, the appellee, against J. R. Rich and T. L. Bryant, the appellants ; was sued out for the purpose of enforcing the payment of certain advances, which, it is alleged, were made by the appellee to them, to enable them to make a crop, and was levied on part of the crop raised by them. At the Fall Term, 1879, of said court, the Hon JOHN HENDERSON presiding, the appellants moved the court for a rule against the appellee to show cause why the attachment should not be dissolved, on the ground, in substance, that it was not issued upon a cause of action authorizing the issuance thereof ; and upon the hearing of the rule, the court dissolved the attachment. At a subse-



[Rich v. Thornton.]

quent day of the term, however, the court, without notice to the appellants, on motion of the appellee, set aside its judgment dissolving the attachment, and reinstated the cause on the docket. At the Spring Term, 1881, the appellants moved the court to strike the cause from the docket, on the ground that at a prior term the attachment had been dissolved by the judgment of the court, "and that on the night court closed, to-wit: on the night of the day upon which the judge presiding left the court and county, and after the court had closed for the day, the judge presiding went to the court room, and without notice to defendants, or their counsel, and without their knowledge or consent, reinstated the cause on the docket, and set aside his former judgment." The court overruled the appellants' motion, and they excepted. They thereupon renewed their motion to dissolve on the same grounds, and "offered to introduce evidence in support of the motion, and the court refused to allow the introduction of the same," and thereupon overruled their motion, to which ruling they reserved an exception. The appellants also moved the court to quash the attachment "because of a variance between the affidavit and attachment writ," but the court overruled the motion, and the appellants excepted.

A complaint having been filed, the cause was tried on the plea of the general issue. On the trial the appellee read in evidence, against the appellants' objection, a mortgage purporting to have been executed to him by them, which contained the recitals and declaration required by the statute to create the statutory lien for advances, and to which there was a subscribing witness; and the appellants excepted to the admission of the mortgage in evidence. Other exceptions were reserved on the trial by the appellants, which the opinion of the court renders it unnecessary to set out. There was a judgment for the appellee, founded on verdict, and from that judgment this appeal was taken. The rulings of the Circuit Court above noted are among the assignments of error here made.

WALDEN & SON and J. L. McCONNELL, for appellants.

DENSON & DISQUE, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The assignments of error are numerous, but pursuing the practice of frequent observance in this court, we shall notice only those insisted upon in the argument of appellants' counsel.

The power of a court of record over its judgments during the term at which they are rendered, is very large, if not unlimited

[Rich v. Thornton.]

It rests within the sound discretion of the court to set them aside, when satisfied that injustice has been done, or that they have been inadvertently or improvidently rendered.—Freeman on Judg. § 90. Resting in the discretion of the court to set aside during the term the judgment dissolving the attachment and dismissing the suit, it was not irregular to act without notice to the defendants. The want of notice, it can not be assumed, was of prejudice to them, as the court could have set aside the judgment despite any objections they could have urged.—*Smith v. Robinson*, 11 Ala. 270.

If an attachment is issued upon a cause of action for which the issue of the process is not authorized by law, the mode of reaching the irregularity is by a rule on the plaintiff to show cause why the attachment should not be dissolved.—*Brown v. Coats*, 56 Ala. 439; *Dryer v. Abercrombie*, 57 Ala. 497. On the hearing of the rule the court should receive evidence in support, or for the discharge of the rule—evidence showing the real nature and character of the demand sought to be enforced by the process. The bill of exceptions recites, that the defendant, to support the motion to dissolve, offered to introduce evidence, which the court refused to receive. The evidence, its nature or character, the facts it tended to prove or disprove, is not stated. Whether it was relevant or irrelevant, primary or secondary, is not shown. The party excepting to the rulings of a primary court, must show by his bill of exceptions, affirmatively, error in the rulings of injury to him. An exception to the rejection of evidence can not be sustained, unless it is shown that the evidence was legal and relevant. If that be not shown, the presumption will be made, if necessary to support the judgment, that it was rejected because illegal, or irrelevant and in consequence illegal.

If there be defects in the affidavit, for which the attachment could be abated, the refusal of the Circuit Court to entertain the motion to quash because of them, is not revisable on error. 1 Brick. Dig. 164, § 153. If there be a variance between the affidavit and writ of attachment, the court was not bound to entertain a motion to quash, based on that ground. Very properly it could have compelled the defendant to resort to a plea in abatement.

The execution of the instrument in writing on which the suit is founded, not having been denied by verified plea, it was properly admitted in evidence, without calling or accounting for the absence of the subscribing witness. In all actions founded on written instruments, if execution is not denied by verified plea, the statute (Code of 1876, § 3036,) declares, they "must be received in evidence, without proof of the execution." The uniform construction the statute has received is, that in the absence

[*Rapier v. Gulf City Paper Company.*]

of a verified plea, the fact of execution is not in issue; it is admitted of record by the defendant — *Wimberly v. Dallas*, 52 Ala. 196.

Let the judgment be affirmed.

## **Rapier v. Gulf City Paper Company.**

*Bill in Equity by Judgment Creditor for Redemption of Property Conveyed by Mortgage.*

1. *Amendments to bills ; rule prior to the statute.*—Prior to the statute (Code of 1876, § 3790), the allowance of amendments to bills in equity, as a general rule, was not a matter of right, but rested largely in the discretion of the court. They were allowed only when the bill was found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. No amendment was allowed, which was repugnant to, or inconsistent with the purposes and objects of the original bill, or which presented a new case.

2. *Amendments to bills under the statute.*—While the statute converts the allowance of amendments to bills from matter of discretion in the court, into a matter of right in the party, if the right is claimed at any time before final decree, such right is not without limit. The complainant can not by amendment make an entire change of parties, introduce a new cause of action, or vary the statement of facts on which the equity of the bill may depend, so that there would be an essential change in the character of the relief to which he would be entitled.

3. *Amendment to bill ; when not allowable.*—To a bill in equity filed by one who, as assignee or purchaser, claimed the equity of redemption in real estate conveyed by mortgage, and, as such, sought to redeem, an amendment is not allowable, in which the complainant, setting up no right to the property, no title or claim to the equity of redemption, but admitting such equity to be in the mortgagor, seeks, as a mere judgment creditor, to be let in to redeem, and that the mortgaged property may be subjected to sale for the satisfaction of his judgment. Such an amendment is a radical departure from the case made by the original bill, in that a new and different right is thereby preferred, and the relief thereby sought is essentially different in character from the relief which could have been obtained on the original bill.

4. *Bills may be filed in a double aspect.*—Bills in equity, as originally filed, or as subsequently amended, may present the complainant's case in a double aspect, or, as it is usually expressed, in the alternative. But, when a bill is so framed, in order to prevent surprise, embarrassment of the defendant in making defense, and the inextricable confusion which would follow from blending in one suit distinct causes of action, the rule is strictly observed, that each aspect or alternative must entitle the complainant to the same relief.

5. *Bills in a double aspect ; when not demurrable.*—A bill seeking an adjustment of conflicting liens on personal property of a debtor, and a sale thereof, and presenting the complainant's right to relief in a double aspect, is not demurrable, when, in one aspect, the complainant bases his right to relief on a transfer and assignment of the personal property



## [Rapier v. Gulf City Paper Company.]

as security for a debt owing to him by the debtor, and, in the other aspect, he seeks relief as a judgment creditor of such debtor, the relief to which the complainant is entitled in either aspect being substantially the same.

6. *Levy of execution on personal property ; when it does not work a satisfaction.*—While the taking of goods in execution by a sheriff, of value sufficient to satisfy the writ, generally operates a satisfaction, this is not the effect of such levy, when the personal property levied on, was restored to the possession of the defendant in execution, or to the possession of a claimant, on the execution of a bond for the trial of the right of property.

## APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This cause was before this court at the December Term, 1878, on appeal from the decree of the Chancery Court overruling a demurrer filed by the appellant, John L. Rapier, one of the defendants in the court below, to the original bill of complaint, and on that appeal the decree of the Chancery Court was reversed and the cause remanded.—*Rapier v. Gulf City Paper Company*, 64 Ala. 330. The case made by the original bill may be stated as follows: In 1876, the appellee, the complainant in the court below, a body corporate, recovered judgment in the Circuit Court of Mobile, against John Forsyth and John L. Rapier, who, as partners engaged in publishing the "*Mobile Daily and Weekly Register*," newspapers in Mobile, and in a "general book publishing and job printing business under the firm name of Forsyth & Rapier, had become indebted to complainant, in a large sum of money. Upon this judgment an execution was duly issued and placed in the hands of the sheriff of Mobile county. Afterwards, Joseph Hodgson, with knowledge of said judgment and execution, purchased from Forsyth all his interest in the property and effects of Forsyth & Rapier, and also an undivided one-half interest in the *Mobile Register* property used by said firm, and which was the private property of Forsyth; and he also leased from the latter the other half interest therein for the term of several years. Hodgson and Rapier then formed a partnership under the firm name of John L. Rapier & Co., for the purpose of continuing the business of the old firm, and agreed with the old firm, among other things, to pay complainant's judgment. Failing to do this, the sheriff levied said execution on the property which had been so transferred to the new firm, and advertised a sale thereof under the levy. After the sale had been postponed from time to time, and after some negotiations, an agreement in writing was made and entered into by and between Forsyth, Rapier and Hodgson, of the one part, and complainant of the other, a copy of which is made an exhibit to the bill. By this agreement Forsyth, Rapier and Hodgson sold, assigned, transferred and conveyed to

[Rapier v. Gulf City Paper Company.]

complainant all of said *Register* property, with the rights, contracts and privileges attaching thereto, subject, however, to certain mortgages thereon, which are described in the agreement. Upon the grantors paying or securing to be paid to complainant said judgment, and certain other indebtedness, charges and expenses therein enumerated, within a certain time fixed by the agreement, it is therein agreed that the complainant "will forthwith sell and re-transfer and deliver to them," according to their respective interests, "the property herein sold, transferred and delivered." It was also provided, that the complainant should not forfeit or lose any lien or right that it might have under its judgment, or executions issued thereon, and that said judgment should remain valid and of force until the time for the re-purchase of said property had elapsed. Under the contract, as the bill avers, the complainant "received a formal transfer of the possession of said property," and one Stokes, who was in the possession thereof at the time of the execution of said agreement, as the special deputy of the sheriff, was continued in the possession thereof and made complainant's agent "to hold and run said business in the dual capacity of agent and deputy sheriff." At the time said agreement was entered into, there were, in addition to other liens, two mortgages on said property outstanding which are described in the bill.

After the right to re-purchase, under said agreement, had been extinguished by lapse of time, and "when complainant was preparing to take the active management and control of the property," Rapier threatened to repudiate the whole transaction, insisting that complainant's judgment, execution and said agreement were fraudulent as against the other creditors of Forsyth & Rapier, and denying complainant's possession of the property; and thereupon said Stokes, combining with said John L. Rapier & Co., and denying complainant's authority and possession, refused to surrender the property to it. Thereupon, complainant caused an *alias* execution to be issued on its judgment, which was levied by the sheriff on said property, and a sale thereof advertised. But before the sale of the property, the trustees in the two mortgages, at the instance and for the benefit of Rapier, Forsyth and Hodgson, as is alleged by the bill, filed with the sheriff a claim bond, under the statute, and thereupon the sheriff delivered the property to John L. Rapier & Co., who were in the possession thereof when the bill was filed. The bill also avers, that the "building in which said *Register* property is placed, and erected and in which said printing and publishing business had been conducted, and which was generally known as the *Register* building, was formerly the property of said Rapier; and the use thereof was put into said es-

[*Rapier v. Gulf City Paper Company.*]

tablishment for the use of said newspaper business; and the said use of said building was one of the rights, privileges and contracts transferred to complainant in said bill of sale;" that Mrs. Caroline Roper was the owner and holder of a mortgage on said real estate for a large amount, and such mortgage had never been foreclosed; and that after the execution of said agreement, Rapier had executed a deed conveying said property to Stokes, which, as the bill charges, was fraudulent as against complainant and a cloud upon its rights. The bill also alleges other conveyances touching the property in controversy, a statement of which is unnecessary to this report. Forsyth died before the bill was filed. Rapier, Hodgson, the personal representative of John Forsyth, deceased, and the several trustees, mortgagees and others interested in said property under the several conveyances relating thereto, were made parties defendant. The principal relief sought by the original bill was, that the complainant, under said agreement, might be declared to have a subsisting right and title to the said property, real and personal, subject to the several mortgages thereon, and be let in to redeem the same. Rapier interposed a demurrer to the bill, which was overruled, and from the decree overruling the demurrer he appealed, and on that appeal, this court reversed the decree of the court below and remanded the cause.

After the cause was remanded, the bill was amended; and to the bill as amended the appellant demurred, and his demurrer was overruled by the Chancery Court. The character of the amendment will sufficiently appear from the facts stated in the opinion, aided by the foregoing statement of the case as made by the original bill. The grounds of demurrer are also stated in the opinion. From the decree overruling the demurrer to the bill as amended, Rapier appealed, and here assigns the same as error.

HANNIS TAYLOR, for appellant. (No brief came to the hands of the reporter.)

CLARK & CLARK, *contra*, cited, *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Floyd v. Morrow*, 26 Ala. 353; *Rives, Battle & Co. v. Walthall's Ex'rs*, 38 Ala. 329; *Cain v. Gimon*, 36 Ala. 173; *Blackwell's Adm'r v. Blackwell*, 33 Ala. 58; *Ingraham v. Foster*, 31 Ala. 123; Freeman on Executions, § 269; *Perry Ins. & Trust Co. v. Foster*, 58 Ala. 502.

BRICKELL, C. J.—This cause was heretofore before this court on demurrers to the original bill, which had been overruled by the chancellor. It was then decided, that it was as an



[*Rapier v. Gulf City Paper Company.*]

assignee or purchaser of and from the mortgagors, the appellee claimed to be let in to redeem the real and personal property, the subject-matter of suit. That the assignment did not pass to the appellee any right or title to the real estate, and, of consequence, the bill was without equity, except so far as it sought an adjustment of the several liens and encumbrances on the personal property, and a sale of it to satisfy them.—*Rapier v. Gulf City Paper Co.*, 64 Ala. 330.

Since, the bill has been amended, the appellee claiming as a judgment creditor to be let in to redeem the real estate conveyed by mortgage to Mrs. Roper, and to avoid, as fraudulent, a conveyance thereof, made by the mortgagor to Stokes, and also a redemption of the personal property from the liens in favor of other parties, to which it is subject; or, if on the facts stated, the appellee is not a judgment creditor, then in the right and capacity of an assignee the adjustment of the liens on the personal property is claimed, and a sale of it to satisfy them.

A demurrer to the amended bill was interposed by the appellant, Rapier, assigning several causes. The first is, that the amendment is a departure from and inconsistent with the original bill, and makes an entirely new case not embraced within that presented by the original bill. Second, that the statements of the amended bill are in the alternative, repugnant to and inconsistent with each other, and the alternative statements do not embrace the same subject-matter. Third, that as a bill by a judgment creditor to redeem lands, the amendment can not be supported, because it is shown there is an unexhausted levy on personal property sufficient to satisfy the complainant's judgment. The demurrer was overruled, and from the decree overruling it, this appeal is taken. We proceed to consider the causes of demurrer in the order in which we have stated them.

1. Prior to the statute (Code of 1876, § 3790), amendments to a bill in equity were allowed only when the bill was found defective in proper parties, in its prayer for relief, or in the omission, or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. No amendment was allowed which was repugnant to, or inconsistent with the purposes and objects of the original bill, or which presented a new case.—1 Brick. Dig. 707, §§ 968-9. As a general rule, the allowance of amendments was not a matter of right—it rested largely in the discretion of the court. Regarded only with reference to the furtherance of justice, the determination of causes upon the merits, the court was liberal in permitting them to cure mere defects of form, or imperfections because of a misjoinder of parties. There was much reluctance in allowing amendments of verified pleadings,

[Rapier v. Gulf City Paper Company.]

so as to vary the facts stated, or to let in new facts. And it was but seldom, that an amendment was allowed after the taking of evidence, introducing facts known to the party, or which, with reasonable diligence, he could have discovered at the time of filing the original pleading.—1 Dan. Ch. Pr. 402, n. 8.

The statute referred to provides: "Amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief." The statute in its terms is very similar to the statute authorizing amendments of pleadings in courts of law, and it has been regarded as intending that the rule governing amendments in courts of equity should conform substantially to the rules and practice prevailing in the former courts.—*King v. Avery*, 37 Ala. 169; *Moore v. Alvis*, 54 Ala. 356. And it converts the allowance of amendments from matter of discretion in the court, into a matter of right in the party, if the right is claimed at any time before final decree. *Pitts v. Powledge*, 56 Ala. 147. The right is not unlimited—the party can not by amendment introduce a new cause of action, or vary the statements of fact on which the equity of the bill may depend, so that there would be an essential change in the character of the relief to which he would be entitled. The statute has been subjected to the construction given the statute of amendments in courts of law. There can not be by an amendment an entire change of parties, the substitution of a new cause of action, or a radical departure from the case made by the original bill.—*King v. Avery*, 37 Ala. 169; *Gardner v. Pickett*, 46 Ala. 191; *Leggett v. Bennett*, 48 Ala. 380; *Penn v. Spence* 54 Ala. 35; *Ala. Warehouse Co. v. Jones*, 62 Ala. 550. An amendment working such changes would be in fact a new bill, and this was not contemplated by the statute. The curing by an amendment, at any time before final decree, of a misjoinder or non-joinder of parties is allowed; or if there be the absence of proper allegations to meet the evidence; or if there be a variance between the allegations and evidence, the cause of action and the subject-matter of suit remaining the same, an amendment may be made curing the defects.

The amended bill, as to the redemption of the real estate, abandons the right averred, and departs entirely from the case made by the original bill. As assignee or purchaser of the equity of redemption, by the original bill the right to redeem the real estate was claimed. The assignment was the foundation of the title; it was supposed of itself to confer a right of property—the equity of redemption. No right of property is now claimed; the equity of redemption in the real estate is admitted to remain in the mortgagor except so far as it is clouded or encumbered by the conveyance to Stokes, averred to be

[Rapier v. Gulf City Paper Company.]

fraudulent. Without a right of property—with no title or claim to the equity of redemption; as a mere judgment creditor, the appellee now claims to be let in to redeem, not that the legal estate may be vested in it, but that the property may be subjected to sale for the satisfaction of the judgment. There is, by the amended bill, a radical departure from the case made by the original bill—a new and different right and title preferred, and if relief were granted, it would vary essentially in character from the relief which could have been obtained on the original bill. Such amendments have not been regarded as authorized by the statute, and were not tolerated by the rules of practice prevailing before the enactment of the statute.

2. Bills in equity may be originally filed, or may be amended, so as to present the case of the plaintiff in a double aspect, or, as is usually said, in the alternative. As we have said heretofore, when a bill is so framed, to prevent surprise, the embarrassment of the defendant in making defense, and the inextricable confusion which would follow from blending in one suit distinct causes of action, the rule is strictly observed, that each aspect or alternative must entitle the complainant to the same relief.—*Gorden v. Ross*, 63 Ala. 363; *Ala. Warehouse Co. v. Jones*, 62 Ala. 550; *Micou v. Ashurst*, 55 Ala. 612; *Rives v. Walthall*, 38 Ala. 329; *Thomason v. Smithson*, 7 Port. 144. And if each alternative averment does not entitle the plaintiff to relief, the averments are insufficient.—*Andrews v. McCoy*, 8 Ala. 920; *Lucas v. Oliver*, 34 Ala. 626; *David v. Shepard*, 40 Ala. 587. The precise point of the demurrer to the amended bill in this respect is, that relief is claimed by the appellee as a judgment creditor, or if not entitled as a judgment creditor, because of the extinguishment of the judgment by the agreement which is exhibited, then as a purchaser of the personal property. In other words, that in one aspect, the bill avers a purchase of the personal property in satisfaction of the judgment, and as purchaser asserts title to it, and in the other avers that the judgment was not satisfied, that the transaction shown by the agreement was not a purchase of the property, but was intended as security for the payment of the judgment and other debts due the appellee, and as a judgment creditor claims relief in respect to the personal property and the redemption of the real estate.

It is apparent from the most casual inspection of the agreement between the parties, that it was not intended the transfer of the personal property should operate as a satisfaction of the judgment, or embarrass or impair the right or remedies of the appellee as a judgment creditor. Security for the payment of the judgment, and all other debts due the appellee was all that was contemplated; and such security was intended to be afforded,



[*Rapier v. Gulf City Paper Company.*]

while the debtors were to be saved from the injury apprehended from a forced sale of the property, the right of redeeming by payment of the debts being secured to them. The agreement does, however, clothe the appellee with the legal title to the personal property, subject to the prior liens or mortgages referred to in it. As to the personal property, the right of the appellee as assignee, and as a judgment creditor, the relief which is prayed, and which can be properly granted, do not materially vary; they are substantially the same in either capacity. As we construe the amended bill, it does not aver the payment of the judgment. There is simply a statement of the facts in relation to the transfer of the personal property, and as purchaser or assignee, or as a judgment creditor, or in both capacities, the same relief is prayed. In this respect, we do not regard the demurrer as well taken; as in either right or capacity, as a judgment creditor, or as assignee, the appellee is entitled to the same relief.—*Rives v. Walthall, supra.* So far as the demurrer relates to the introduction into the bill of the appellee's right as a judgment creditor to redeem the real estate, it is not necessary to determine whether a bill may be framed in the alternative, one of which refers to particular property, and the other to property of a different kind or character. Such averments it is rather difficult to regard as alternative; but as the amendment touching the redemption of the real estate was improperly allowed, and as that can not hereafter form a matter of controversy in this suit, we do not consider the question.

3. The effect of an unexhausted levy of execution on personal property, on the right of a judgment creditor to proceed in equity to subject the judgment debtor's equity of redemption in lands, in the view of the case we have taken, is not now involved. The taking of goods in execution by a sheriff, of value sufficient to satisfy the writ, operates a satisfaction generally. But here the personal property levied on was restored to the possession of the defendants in execution, or to the possession of the claimants, on the execution of the bond for the trial of the right of property, and the levy did not operate a satisfaction in whole or in part.—*Crawford v. Bank of Mobile*, 5 Ala. 55; *Leach v. Williams*, 8 Ala. 759.

The first ground of demurrer to the amended bill was well taken, and should have been sustained; the second and third were properly overruled.

Reversed and remanded.

[Hooper v. Yonge.]

## Hooper v. Yonge.

### *Petition to Court of Equity for Writ of Assistance by Purchaser of Lands Sold under its Decree.*

1. *Writ of assistance ; jurisdiction of courts of equity to issue.*—A court of equity has authority, both by virtue of its common law jurisdiction and under the express provisions of the statute, to issue writs of assistance or possession, for the purpose of enforcing its orders and decrees ; and in the exercise of this power, it can compel the delivery of the possession of land sold under its decrees, by any of the parties to the suit, by persons coming into possession *pendente lite*, or by mere naked trespassers.

2. *Same ; exercise of the authority to issue discretionary.*—But authority to issue writs of assistance is largely discretionary, and will not ordinarily be exercised without application supported by affidavit, showing due service of the decree sought to be enforced, and that it had not been obeyed ; and, according to the better practice, notice of the motion for the issuance of the writ should be given to the adverse party.

3. *Same ; when should be refused.*—The remedy afforded by the writ of assistance being summary in its character, the writ should be refused by the court, where a purchaser, seeking its aid to enforce the delivery of the possession of lands purchased by him under the decree of the court, has suffered several years to elapse after his purchase before filing his application for the writ, thus creating the reasonable presumption, that the party in possession holds as tenant of the purchaser, or under other like claim of right, which is not negated by the averments of the petition, or by any proof.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

On the 11th June, 1875, the Chancery Court of Lee county, in a suit then pending in that court, wherein George D. and George W. Hooper were complainants, and W. C. and M. A. Yonge were defendants, rendered a decree of foreclosure of a mortgage executed by the defendants to the complainants, and ordered a sale of the lands conveyed thereby for the payment of the mortgage debt. On 15th November, 1875, the register sold the lands under the decree, and at the sale the complainants became the purchasers, and thereafter reported the sale to the court, but the defendants resisted the confirmation thereof, and it was not confirmed until 1878. On 15th March, 1882, the purchasers filed their petition, duly verified, setting forth the facts above stated, and averring further, that on 27th October, 1878, W. C. Yonge died ; that "Mrs. Mary A. Yonge, the defendant, has continued in the occupancy of said real estate since her husband's death to this time ;" that they have postponed

[Hooper v. Yonge.]

legal steps to obtain possession "in consequence of the urgent solicitation of the said deceased, made directly, and of receiving applications, purporting to come from the other defendant, before and after said death;" that during the year 1881, they were informed, for the first time, that the defendant claimed the premises sold to them by the register, "independently of your petitioners;" that the decree under which the sale was made ordered the register to place the purchasers in possession of said real estate, and that on 11th March, 1882, they applied to the register for a writ of assistance for the purpose of obtaining possession, but the register refused to issue it. No parties are made to the petition, but Mrs. M. A. Yonge, by her solicitor, accepted service thereof. The prayer of the petition is for an order directing the register to issue the appropriate writ to put them in possession of the real estate so purchased by them. Mrs. Yonge demurred to the petition assigning the following, among other grounds, to-wit: 1. The petition showed that the petitioners had postponed legal steps to obtain possession of the lands in controversy, and allowed the defendant to occupy the same, and that she thereby became a tenant at will. 2. An order of court had never been served on her or made known to her, requiring her to deliver or surrender possession. 3. No notice was given her of the filing of the petition. 4. The petition shows that the decree, to enforce which the assistance of the court is asked, was of long standing, and the court ought not to enforce its decrees rendered years ago in this summary manner. No proof explanatory of the petitioners' delay in obtaining possession, is in the record.

The chancellor was of the opinion that, after so long a delay, the averments of the petition were defective, and refused to make the order therein prayed for; and his ruling is here assigned as error.

GEO. D. & GEO. W. HOOPER, appellants, *pro se*, cited *Creighton v. Paine*, 2 Ala. 158; *Trammel v. Simmons*, 8 Ala. 271; *Kershaw v. Thompson*, 4 Johns. Ch. R. 607.

H. C. LINDSEY, *contra*, cited *Schenck v. Conover*, 13 N. J. Eq. Rep. 220; *Barton v. Beatty*, 28 N. J. Eq. Rep. 412; *Vanmeter v. Borden*, 25 *Ib.* 414; *Kershaw v. Thompson*, 4 Johns. Ch. R. 609; *Creighton v. Paine*, 2 Ala. 158; *Trammel v. Simmons*, 8 Ala. 271; *Devaucene v. Devaucene*, 1 Edw. p. 272; *Blauvelt v. Smith*, 22 N. J. Eq. Rep. 31.

SOMERVILLE, J.—Courts of chancery have authority, both by their common law jurisdiction and under the express provisions of the statute, to issue writs of assistance, or possession, for



[Lehman, Durr &amp; Co. v. Shook.]

the purpose of enforcing their decrees or orders, and in the exercise of this power they can compel the delivery of personal property, or the possession of land, by any of the parties to the suit, by persons coming into possession *pendente lite*, or by mere naked trespassers.—*Johnson & Seats v. Taylor*, at present term; Code, 1876, § 3906; *Trammel v. Simmons*, 8 Ala. 271; *Creighton v. Paine*, 2 Ala. 158.

But this right is largely discretionary, and will not ordinarily be exercised without application supported by affidavit, showing due service of the decree or order of the court sought to be enforced, and that it has not been obeyed; and, according to the better practice, *notice* of the motion requesting the issue of the writ should be given to the adverse party.—*Creighton v. Paine*, *supra*; *Devaucene v. Devaucene*, 1 Edw. (N. Y.) 272; 2 Daniell's Ch. Prac. 1062–63; *Thompson v. Campbell*, 57 Ala. 183.

So it is plain, that, being summary in its character, the writ should be refused by the court when the purchaser, seeking the aid of it to enforce his possession, has been guilty of such delay as to leave it doubtful whether or not he has given to the person in possession the right to remain. The rule, in other words, is to refuse the writ except in clear cases.—2 Dan. Ch. Pr. (5th Ed.) 1063, note 3; *Barton v. Beatty*, 28 N. J. Eq. Rep. 412; *Kershaw v. Thompson*, 4 Johns. Ch. Rep. 609.

The petitioners in this case have allowed between six and seven years to elapse from the day of their purchase of the lands in controversy to the date of filing the application. The reasonable presumption in such a case is, that the party in possession holds as a tenant of the purchaser, or under other like claim of right. This is not negated by the petition or by any proof, and on this ground we are of opinion that the chancellor did not err in refusing the relief prayed.

Affirmed.

## Lehman, Durr & Co. v. Shook.

*Bill in Equity to Enjoin Action of Ejectment, and to Cancel Deed as a Cloud upon Title.*

1. *Failure to record deed to land; its effect against subsequent encumbrancer.*—The failure to record a deed conveying lands until more than three months after its execution, and until the vendor has conveyed the lands in mortgage to secure a debt contracted contemporaneously with

[Lehman, Durr &amp; Co. v. Shook.]

the execution of the mortgage, is void and inoperative against the mortgagee, he having no notice of the existence of the deed.

2. *Sale of land under power contained in a mortgage; its effect and operation.*—A sale of land under a power contained in a mortgage is equivalent to a decree of strict foreclosure, cutting off, and barring the equity of redemption, uniting in the purchaser the legal estate vested in the mortgagee, and the equity of redemption residing in the mortgagor, and leaving in the mortgagor or his alienee only the right or privilege of redemption conferred by the statute.

3. *Redemption by judgment creditors; what rights acquired thereby.* Judgment creditors of the mortgagor who redeem lands sold under a power contained in the mortgage, succeed, by operation of law, to the place of the purchaser from whom they redeem, and are entitled to, and may maintain all the rights he could have asserted; and when in possession, they can successfully defend an action of ejectment brought against them by alienees of the mortgagor claiming under a prior deed, which is void as against the mortgage on account of the failure to have it recorded prior to the execution of the mortgage, and within the time prescribed by the statute.

4. *Bill in equity to enjoin action at law and to remove cloud from title; when it will be entertained.*—In this case the bill was filed by judgment creditors who had redeemed lands sold under a power contained in a mortgage from the purchaser, and had been let into possession, to enjoin an action of ejectment brought against them by alienees of the mortgagor, his daughters, claiming under a deed executed prior to the mortgage, reciting a valuable consideration, but which was not recorded until after the mortgage was executed, and more than three months after its execution; and to have the deed declared fraudulent and void, and cancelled as a cloud upon complainants' title. The bill also charges, and the evidence tends to prove, that the deed was voluntary, and fraudulent. *Held*, that the bill contained equity, and the complainants were entitled to an injunction of the suit at law, and a cancellation of the deed as a cloud upon their title. (BRICKELL, C. J., holding, that the deed was void as against the mortgage by reason of the failure to have it recorded, and that the complainants, being in possession, were entitled to the relief, independently of the question of fraud; SOMERVILLE, J., holding, that if there was no averment of fraud, it might be seriously questioned whether such a bill would lie, or ought to be maintained; but that, in as much as the deed purports on its face to be a valid conveyance, constituting a cloud on the title, and had been fraudulently executed, equity would take jurisdiction, a court of law being powerless to cancel the deed. STONE, J., *dissenting*, *held*, that while to remove a cloud from the title to land at the instance of the party in possession, is a clear ground of equity jurisdiction, it is exceptional and *quia timet* in its nature, and exists only because the party in possession has no opportunity of testing the strength of his own title, or that of his adversary; and that in this case the reason upholding the jurisdiction failing on account of the pendency of the action of ejectment, and both titles being purely legal, the case presented by the bill is one of legal cognizance only, and a court of equity should not entertain the bill, or grant the relief sought.)

APPEAL from Etowah Chancery Court.

Heard before Hon. H. C. SPEAKE.

The bill in this cause was filed, April 25th, 1879, by Lehman, Durr & Co. against Laura E. Shook and Hester E. Hodges (formerly Shook), to have delivered up and cancelled, as fraudulent and void, and as a cloud upon complainants' title, a deed executed to the defendants by their father, W. T. Shook, con-

[Lehman, Durr &amp; Co. v. Shook.]

veying to them certain real estate situate in the town of Gadsden, and to enjoin them from further prosecuting an action of ejectment, which they had commenced against the complainants for the recovery of the land conveyed in the deed. The case made by the bill may be summarized as follows: On the 27th of September, 1874, the complainants recovered judgment against W. T. Shook in the Circuit Court of Etowah county for money which they had loaned him in November, 1872. On the 14th of August, 1873, W. T. Shook borrowed \$500 from the Mobile Life Insurance Company, a body corporate, and secured it by a mortgage, executed contemporaneously with the loan, on the real estate in Gadsden, with power of sale. Shook having made default, the company, on the 30th of April, 1875, sold the real estate under the power contained in the mortgage, and one R. T. Conley became the purchaser, to whom the company afterwards conveyed it. On the 2d of August, 1876, the complainants, as judgment creditors of W. T. Shook, filed their bill in said Chancery Court against him, said Conley, and one Collins, to whom it was alleged Conley had sold said real estate, to redeem. Collins was a non-resident, and a decree *pro confesso* was taken against him. On December 14th, 1877, they were, by the decree of said court, let in to redeem; and on the 30th January, 1878, they were put in possession by and under the further decree of said court. On the 10th of June, 1873, W. T. Shook executed to the defendants in this cause the deed under which they claim the land in controversy. This deed recites a consideration of \$3000 as paid by the defendants to their father. It was not filed for record until about 1st December, 1873, and W. T. Shook continued in possession of the real estate until the time of the sale by the insurance company to Conley. The bill charges that the recital in the deed as to the consideration is false; that it was voluntary, and was made by Shook, who was then insolvent, with the intent to defraud his creditors. On the 14th of February, 1879, the defendants commenced their action of ejectment against complainants, which is sought in this suit to be enjoined. It is also averred in the bill that neither the complainants, nor the insurance company had any notice of the execution of the deed by Shook to his daughters, the defendants.

The defendants demurred to the bill on the following, among other grounds: (1). Because the bill alleges that the complainants are in possession of the property alleged to be fraudulently conveyed, and that the respondents have now pending, and are actively prosecuting, their action of ejectment to recover possession of said property from complainants, and to test their title to the same, as against complainants, and no reason is alleged in the bill "why the complainants can not set up the mat-



[Lehman, Durr &amp; Co. v. Shook.]

ters and things stated therein as a ground for this court of equity to take jurisdiction of said matters and things, in their defense to said ejectment suit." (2). Because the bill shows that the complainants have a full, adequate and complete remedy at law for the grievances and wrongs set forth in the bill. (3). Because the bill shows that a court of law has already taken jurisdiction of the matters and things charged in the bill, and no reason is assigned why a court of equity should enjoin the court of law from carrying into execution its jurisdiction and power as to such matters, or why the court of law can not grant the complainants as full, adequate and complete relief as a court of equity. (4). Because it is apparent from the bill that a court of equity has no jurisdiction of the cause as made by the bill. Their demurrer was overruled, and they answered, denying that the deed was fraudulent or voluntary, and insisting that it was executed for a valuable consideration and in good faith, and conveyed to them the title to the said real estate, which was superior to the complainants' title. In an amendment to their answer, they also averred that the decree under which the complainants redeemed and were let into possession, was afterwards vacated and annulled, and the bill dismissed.

On the hearing, had on pleadings and proof, the chancellor found that the deed executed to the respondents by their father, was voluntary and fraudulent; but being of the opinion from the evidence, that the complainants were not entitled to redeem, and following the decision rendered by him on final hearing in the case of *Lehman, Durr & Co. v. Collins* and others, he caused a decree to be entered, dismissing complainants' bill. From that decree this appeal was taken, and it is here assigned as error. An appeal was also taken by the complainants from the decree dismissing their bill against Collins and others, and it was by this court reversed. That case is reported in this volume, *ante*, p. 127.

AIKEN & MARTIN, with whom were RICE & WILEY and E. P. MORRISSETT, for appellants. (1). It is admitted that a party in possession of land with a good legal or equitable title, can file a bill to set aside a deed executed to defraud the creditors of the grantor.—*Rea v. Longstreet*, 54 Ala. 291. The jurisdiction in such case rests upon the theory, that the party in possession can not bring a suit at law against himself, and the party holding the cloud on the title might delay bringing suit, until the testimony of his adversary had been lost. The mere fact, that the party claiming under the deed which is a cloud, brings a suit at law against the party in possession can not change the rule. One trial in ejectment, if the verdict should be for the defendants, is not final; but the plaintiffs could re-

[Lehman, Durr &amp; Co. v. Shook.]

new their suit at any future time. The cloud would still remain upon the title; and the same reasons apply with all their force for allowing complainants to file a bill to remove the cloud *after* the trial of the ejectment suit and verdict for them, as *before* the commencement of such suit. No case can be found where a pending ejectment suit ousted the jurisdiction of a court of equity. (2) The complainants' title under the decree allowing them to redeem, is equitable, and, although superior to the title of defendants, they could not defend under it in the action of ejectment.—Code of 1876, § 3899. In such case the jurisdiction of a court of equity is clear.

DENSON & DISQUE, *contra*. (1). It is a general rule that equity never enjoins an action at law except in cases where an unfair use is being made of the legal forum, which, from circumstances of which equity alone can take cognizance, should be restrained, lest an injury be done that would be wholly remediless at law. High on Inj. § 44; *Smithurst v. Edmunds*, 1 McCarter (N. J.), 408; *Richardson v. Mayor*, 8 Gill (Md.), 433. (2). A court of law is as potent to condemn the title of the appellees upon the ground that the same was made to hinder, delay and defraud creditors, as a court of equity.—*Stokes v. Jones*, 21 Ala. 731. (3). The appellees suing at law to test the validity and superiority of their title to that of appellants, will not be enjoined, since the interference in such case would be repugnant to the principle that, where different courts have concurrent jurisdiction, the right to determine the controversy belongs to the tribunal to which resort is first had.—High on Inj. § 63. (4). It is settled law, that one out of possession can not maintain a bill to remove a cloud from title, because an opportunity is then presented to determine his title at law, as it is optional with him to bring an action of ejectment, whenever he pleases. It seems that it would be a correct and logical corollary from this well settled principle, that whenever an appropriate action is pending in a law court, to determine the validity, strength and superiority of title to land, the party in possession can not enjoin the legal proceedings, and transfer the question to a court of equity, and there have it determined. (5). The principles which authorize a court of equity to interfere to remove a cloud from the title, is that a party, being in possession, can not bring an action against himself, to test the strength of his title, or to establish it, and it would be inequitable and unreasonable to require him to stand by in suspense, until it suits the interest or caprice of his adversary to bring suit, thus leaving his title in the meantime under distrust, while he is embarrassed in its use and enjoyment, its alienation chilled, its value depreciated, and he liable to lose the benefit

[Lehman, Durr &amp; Co. v. Shook.]

of important evidence by the death of witnesses, or the facts fading from their memory by lapse of time.—*Rea v. Longstreet*, 54 Ala. 291. (6). But all the evils which bring these principles into operation, and which give jurisdiction to courts of equity, are obviated, when an action of ejectment is brought, and is then actively prosecuted to determine the validity, priority and superiority of the titles to the property in question. In this case, as ample opportunities are offered the appellants to show the defects in appellees' title in the action of ejectment, the reason upholding the jurisdiction of the court of equity fails, and that court should not interfere.—*Jones v. DeGraffenreid*, 60 Ala. 145–51; *Shaw v. Lindsey*, 60 Ala. 345–51; *Johnson v. Murphey, Agnew & Co.*, 60 Ala. 288–93; *Huntington v. Allen*, 44 Miss. 663; *Glazier v. Bailey*, 47 Miss. 395; *New York v. Ins. Co.*, 11 Paige, 384; *Beauchamp v. Putnam*, 34 Ill. 378; *West v. New York*, 10 Paige, 539.

BRICKELL, C. J.—The result of the decision in *Lehman, Durr & Co. v. Collins*, at present term, *ante*, 127, is, that the appellants, by the decree of the court of chancery, letting them in to redeem the premises in controversy, acquired the title and estate of William T. Shook, which he had by mortgage conveyed to the Mobile Life Insurance Company. The conveyance of the premises to his daughters was executed prior to the mortgage, which was a security for a debt contemporaneously created; and the fact is, that the mortgage was executed with the knowledge and with the consent of the daughters, verbally expressed, intending that it should have precedence of the conveyance to them. We do not deem it necessary to examine closely the evidence, and determine whether the conveyance to the daughters is free from fraud, founded on a valuable consideration, and capable of being enforced against the creditors of the grantor. Conceding its validity, the failure to record it until more than three months after its execution, and until the mortgage to the Life Insurance Company had been recorded, renders it void and inoperative as against that mortgage.—*Saffold v. Wade*, 51 Ala. 214.

The only right or equity the daughters could have asserted, was the redemption of the premises from the mortgage. The sale under the power in the mortgage was the equivalent of a decree of strict foreclosure; it cut off and barred the equity of redemption, uniting in the purchaser the legal estate vested in the mortgagee, and the equity of redemption residing in the mortgagor, and in the daughters as his alienees.—*Childress v. Monette*, 54 Ala. 317. All that remained to the mortgagor was the right or privilege of redemption conferred by the statute; a right to re-purchase the lands, and to be restored to the estate



[Lehman, Durr &amp; Co. v. Shook.]

he had in them at the execution of the mortgage, and at the time of the sale under the power. The same right or privilege the statute reserved to the daughters, because of the conveyance to them by their father, the mortgagor.—Code of 1876, § 2886. The right or privilege is strictly statutory; in the absence of the statute, it would have no existence. If it is not claimed and exercised in the mode, within the time, and upon the terms and conditions prescribed by the statute, it is waived and lost.—*Spoor v Phillips*, 27 Ala. 193; *Grigg v. Banks*, 59 Ala. 311.

The purchaser at the sale under the mortgage succeeded to all the estate of the mortgagee, and to all his rights and equities, as well as to the equity of redemption the mortgagor or his alienee could have asserted. He was in a large sense the assignee of the mortgagee, substituted to his place, acquiring his rights. The appellants, by the redemption, by operation of law, succeeded to the place of the purchaser from whom they redeemed, and are entitled to stand upon and maintain all the rights he could have asserted.—*Keeling v. Heard*, 3 Head (Tenn.), 592. They are in possession, and can successfully defend the action of ejectment the daughters have commenced against their tenants. The mortgage, the source of their title, having been recorded before the deed to the daughters, and three months having elapsed after the execution of the deed before its registration, the statute renders it void as against the mortgage.—Code of 1876, § 2166.

A court of equity is reluctant to interpose by injunction against an ejectment at law, founded on a legal title the plaintiff is fairly proceeding to establish. An equitable case, a case of purely equitable cognizance, must be made to appear, before the court will interpose to restrain the proceedings in the action. *Kerr on Injunctions*, 26. If the action of ejectment was not pending, the equity of the appellants would be undoubted. The deed to the daughters, though void as against their title, is prior in date, apparently the older and better conveyance, and is of record. A purchaser from the appellants, tracing the title, would find it, and its invalidity not appearing on its face, resting upon extrinsic facts, it is evident a sale could not probably be effected for the fair value of the premises. Whenever a deed or other instrument exists, not void upon its face, which may be vexatiously or injuriously used against a party having the rightful possession of real estate, throwing a cloud or suspicion over his title or interest, and he has not at law a plain and adequate remedy for relief against it, the constant practice of a court of equity is to intervene, and remove the cloud or suspicion—when the suspicion is reasonable—by directing that the instrument be delivered up and cancelled, or by making the de-

[Lehman, Durr &amp; Co. v. Shook.]

cree in reference to it, which, under the particular circumstances of the case, justice and the rights of the parties may require. 1 Story's Eq. §§ 692-711. No general rule can be laid down which will cover all the cases in which the court will interpose at the instance of a party in possession having a clear title, to remove from it all clouds, and for the prevention of future litigation. The jurisdiction does not rest upon arbitrary rules; much depends upon the facts of the particular case, and in the exercise of the jurisdiction, the court is clothed with a large discretion.—*Fonda v. Sage*, 48 N. Y. 173. The whole doctrine is referable to the general jurisdiction which the court exercises in favor of a party *quia timet*. It is intended for the prevention of litigation, which the outstanding instrument, apparently valid, may generate in the future, to protect the true title from all injury probably resulting from it, and to render the possession quiet and secure. It is only at the instance of a party in possession the court intervenes, for the reason that if he have not possession, the remedy at law for the recovery of it is generally plain and adequate. When in possession, the law furnishes him no legal remedy for the trial of the strength of his own title and the contestation of the validity of the outstanding instrument. This is, however, only one of the reasons for which the court intervenes. There are other and broader reasons—the prevention of litigation, the protection of the true title and the possession, and because it is the real interest of both parties, and promotive of right and justice, “that the precise state of the title be known, if all are acting *bona fide*; and if not, that a merely colorable and pretended claim is a fraud upon the real owner, and as such should be extinguished.”—1 Story's Eq. § 711a

The pendency of the action of ejectment ought not to arrest the jurisdiction of the court. If that action is prosecuted diligently, there can be, it is true, but one result, a verdict and judgment for the appellants. Its continued prosecution rests wholly in the discretion of the plaintiffs—they can at any time abandon or dismiss it, and renew it at any time, until the statute of limitations has perfected a bar. If they elect to continue its prosecution, the verdict and judgment in favor of the appellants would not bar a second action. Two judgments in favor of the defendant in an action of ejectment, putting in issue the same title, not one, operate a bar to a subsequent action.—Code of 1876, § 2969. The pendency of the action is rather an additional reason for the interference of a court of equity, than an objection or an obstruction to its jurisdiction. *Woods v. Monroe*, 17 Mich. 238. There is the greater necessity for quieting the title and the possession, and removing the cloud which affects its value and security. If the court should

[Lehman, Durr &amp; Co. v. Shook.]

now refuse intervention, the action of ejectment could be immediately dismissed, the obstruction to the intervention of the court removed, and there would then be an unquestioned equity on the part of the appellants to invoke the jurisdiction of the court, and an unquestioned duty on the part of the court to intervene. The intervention and jurisdiction of the court can not be subjected to the mere caprice or volition of parties holding instruments of no real value to themselves, but which can be of immediate injury, and may at any time be made the cause of vexation to the rightful and lawful possessors and owners of land. It is against conscience that such instruments should be retained, and it is hardly possible that they are retained for any other than some sinister purpose. Reluctant as may be a court of equity to stay proceedings in ejectment to try the legal title to lands, the special circumstances of particular cases, the inability of courts of law to meet all their exigencies, sometimes necessitate the intervention of the court. When there is a clear ground for the intervention of the court, of which the court of law has not jurisdiction, the jurisdiction of the two courts is not concurrent, and where relief is necessary for the purpose of removing a cloud upon an undoubted legal title, a case of purely equitable cognizance is presented. High on In. § 327.

The decree of the chancellor must be reversed, and the cause remanded to the Court of Chancery, with instructions to render a decree enjoining the action of ejectment, and declaring the conveyance of the premises, executed by William T. Shook to his daughters, Laura E. and Hester E., bearing date June 10th, 1873, of record in the court of probate of Etowah county, void and inoperative as against the title of the appellants.

SOMERVILLE, J.—I concur in the conclusion reached by the Chief Justice in this case, without committing myself to the views expressed in his opinion. The bill is filed by a complainant, who claims to hold the legal title to certain lands, and its purpose is to cancel a deed held by two of the defendants on the same lands, on the ground that the instrument was *void for fraud*, and was a *cloud on the title* of complainants. If there were no averment of fraud, it may be seriously questioned whether such a bill would lie, or ought to be maintained. But when an instrument purports on the face of it to be a valid conveyance, so as to constitute a cloud on the title of the property conveyed, and has been fraudulently executed, as seems to be the case here, I am of opinion that equity will and should take jurisdiction, on the ground that the remedy by ejectment at law is not full and adequate. A court of law is incompetent to sweep away the deed which clouds complainants' title, so long



[Lehman, Durr & Co. v. Shook,]

as it remains in the hands of the defendants uncanceled, and especially where it has been recorded under the registration laws. The sale of real estate may be interminably embarrassed so long as the property is clouded by such an encumbrance. For the support of these views I refer to my dissenting opinion in *Smith's Ex'r v. Cockrell*, 66 Ala. 64, where the authorities are fully collated.

STONE, J., *dissenting*.—Each of the parties to this suit claims under a title strictly legal. Lehman, Durr & Co. are in possession, and the Shooks instituted an action of ejectment to dispossess them, claiming under a legal title. The title of Lehman, Durr & Co. is legal. The Shooks showed no disposition to dismiss the action of ejectment, or to relax in its prosecution. To recover in that action, they must show a paramount legal title. If the title of Lehman, Durr & Co. is the better, then the Shooks will fail in the ejectment suit. So, the present contention presents the simple, naked question of the trial of strength between two rival legal titles, for the trial of which an action at law had been commenced, and was being prosecuted, by the claimant out of possession, against the claimant in possession. In this stage of the controversy, Lehman, Durr & Co. filed a bill in chancery against the Shooks, prayed for and obtained a temporary injunction against the action at law, and sought to have the question of title settled by a decree of that court. The chancellor dismissed the bill, and my brothers have reversed his decree, and granted the relief prayed. The bill seeks no discovery, and no removal of any obstruction to a fair test of the title in the ejectment suit. To make the case still more clearly one of legal cognizance, the opinion of the majority of the court declares, and reaffirms what was decided in the case of *Lehman, Durr & Co. v. Collins*, at the present term, *ante* 127, that the legal title of Lehman, Durr & Co. is superior to that of the Shooks. So, the case is narrowed down to this: Can the powers of the Chancery Court be successfully invoked by one in possession of real estate, holding under a title legal in form, against another who also asserts legal title to the same lands, and who is asserting that title by suit in ejectment, and this, before there has been any verdict or judgment pronouncing upon the validity of the respective titles? And, in such case, will an injunction be awarded, arresting the action of ejectment, and transferring the trial of these legal titles to the Chancery Court? And is the prayer in such bill to have the adversary's title declared subordinate, and decreed to be delivered up and cancelled, a sufficient equity to displace the common right of all men to have their legal rights determined before law forums, and their contested legal demands tried by a jury of their country?

[Lehman, Durr &amp; Co. v. Shook.]

To remove a cloud from title, is certainly one of the clear grounds of equity jurisdiction. This, as I understand the principle, is part and parcel of the doctrine of *quia timet*. It is unreasonable that one's title to land should remain forever in doubt, or should so remain until the holder of an adversary title may choose to test its strength by suit. It may be, he will refrain from suing, until facts are forgotten, or until witnesses have died, or removed beyond the jurisdiction of the court, and, in any event, the tendency, if not the effect of such outstanding, adversary title, is to impair the vendibility and market value of the land. Hence, courts of equity will entertain jurisdiction, and remove the cloud from the title. But at whose instance? Not at the instance of the party out of possession. Why? Because, being out of possession, there is no impediment to his bringing his action at law, and testing the strength of his own, and his adversary's title. So, we hold that to maintain such bill, the complainant, if his asserted title be legal, must be in possession; and such is the overwhelming weight of authority.—*Smith v. Cockrell*, 66 Ala. 64; *Tyson v. Brown*, 64 Ala. 244; *Baines v. Barnes*, *Ib.* 375; *Jones v. DeGraffenreid*, 60 Ala. 145; *Daniel v. Stewart*, 55 Ala. 278; *Rea v. Longstreet*, 54 Ala. 291; *Orton v. Smith*, 18 How. (U. S.) 263; *Woods v. Monroe*, 17 Mich. 238; *Herrington v. Williams*, 31 Tex. 448; *Polk v. Pendleton*, 31 Md. 118; *Eckman v. Eckman*, 55 Penn. St. 269; *Sherman v. Fitch*, 98 Mass. 59; *Clouster v. Shearer*, 99 Mass. 209; *Sullivan v. Finnegan*, 101 Mass. 447; *Clark v. Life Ins. Co.*, 52 Mo. 272; *Burton v. Gleason*, 56 Ill. 25; *Branch v. Mitchell*, 24 Ark. 431; *Barron v. Robbins*, 22 Mich. 35; *Lake Bigler Road Co. v. Bedford*, 3 Nev. 399.

As I understand the opinion of my brother, the Chief Justice, he does not gainsay the principle stated above. He contends, however, that Lehman, Durr & Co., the complainants in this suit, are in possession, and, therefore, they meet the required conditions for the maintenance of this bill. The answer to this is, that the Shooks had already commenced their action and were prosecuting it, and hence the reason of the rule had failed in this case. The rule itself being exceptional and *quia timet*, should it not also cease when the reason on which it rests ceases to exist? But, says the argument, the Shooks may dismiss their ejectment suit, and thus leave Lehman, Durr & Co. without remedy, save in chancery. A sufficient answer to this is, that they have not done so; and the present bill is framed, not in the fear that they will dismiss their suit, but to enjoin them from prosecuting it. Jurisdiction is predicated of facts averred, not of possibilities, or events that may happen. "Sufficient unto the day is the evil thereof."

[Lehman, Durr &amp; Co. v. Shook.]

It is a rule that chancery can not be invoked, when there is an adequate remedy at law.—*Ryan v. Mackmath*, 3 Bro. C. C. 15; *Franco v. Bolton*, 3 Ves. Jr. 368; *Gray v. Mathias*, 5 Ves. 286; *Simpson v. Ld. Howden*, 3 Myl. & Cr. 97; *Pratt v. Pond*, 5 Allen, 59; 1 Brick. Dig. 639, § 3. It is contended by the Chief Justice that a recovery in ejectment by Lehman, Durr & Co. would not be complete and adequate; that the title under which the Shooks claim would be still outstanding, and may become the foundation of another suit. Under our statute, Code of 1876, § 2969, “two judgments in favor of the defendant in an action of ejectment, or in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land or any part thereof, between the same parties or their privies, founded on the same title.” The present bill seeks to restrain Shook from having one judgment of the court on the strength of his title. Is this in accordance with the principles on which this doctrine rests? In this aspect of this case, it can be maintained, if at all, as a bill of peace—closely allied to bills *quia timet*. Speaking of bills of this class, Story, 2 Eq. Ju. § 859, says: “Another class of cases to which bills of peace are now ordinarily applied, is, where the plaintiff has, after repeated and satisfactory trials, established his right at law; and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it.” After stating that this doctrine was much questioned by Lord Cowper (whose decision, however, was overruled by the House of Lords), this author continues: “And this doctrine has ever since been steadily adhered to. However, courts of equity will not interfere in such cases before a trial at law; nor until the right has been satisfactorily established at law. But, if the right is satisfactorily established, it is not material what number of trials have taken place, whether two only, or more.” In *Eldridge v. Hill*, 2 Johns. Ch. 281, Chancellor Kent said: “A bill of peace, enjoining litigation at law, seems to have been allowed only in one of these two cases; either where the plaintiff has already satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render an issue under the direction of this court indispensable, to embrace all the parties concerned, and to save multiplicity of suits.” In *Devonsher v. Newenham*, 2 Sch. & Lef. 199, the subject of the controversy was a considerable landed estate, of which John Devonsher was tenant in tail, with remainder to his brother in tail. John Devonsher levied a fine and suffered a common recovery, and then made his will, devising his estate for the payment of his debts and for other purposes. The bill was filed in the name of the widow and all the children of



[Lehman, Durr &amp; Co. v. Shook.]

John Devonsher. The chancellor, Lord Redesdale, said : "The trusts of that will are to be carried into execution ; and it is contended that therefore the persons claiming under that will have a right to litigate, upon a bill brought to carry those trusts into execution, the right of any person claiming paramount to the will ; not merely the title of the person who would claim in case the will were not formally executed, but (for it must extend so far) the right of any person whatever who may conceive that the testator had no title to the estate, but he himself has a paramount title. . . . That is the claim contended for by the parties plaintiff here. Now, no such suit has ever been entertained, as far as I can find ; and it would be most dangerous to give the example of entertaining such a suit. Whenever one person claims title against another who is in possession, and the enjoyment of that person is disturbed, and he is put into a situation where he can not have that enjoyment as he ought in conscience to have it, there are cases where, for the purpose of quieting the possession, a suit is entertained. For example, where several ejectments have been brought in succession, and a bill is filed to quiet the possession and prevent perpetuity of suits, upon which the court can decree a perpetual injunction, such a bill will be entertained. But when the question is merely whether A. or B. is entitled to the property, and there has been no actual suit between them, there is no instance where a bill has been entertained." See also, strongly in point, *Welby v. The Duke of Rutland*, 6 Bro. Parl. Cases, 575. In the case of *Leighton v. Leighton*, 1 Pere Wms. 671, there had been two trials at law, with the same result. The court enjoined further suit on the title which had been twice pronounced invalid. The case of *Lord Tenham v. Herbert*, 2 Atk. 483, came before Lord Hardwicke. It was a case of disputed right of fishery between two Lords of Manors. A demurrer was sustained to the bill, the Lord Chancellor remarking that "where a question about a right of fishery is only between two Lords of Manors, neither of them can come into this court, until the right is first tried at law." In *Weller v. Smeaton*, 1 Bro. C. C. 572, Lord Chancellor Thurlow's opinion is correctly expressed in the head note as follows : "Bill to be quieted in the possession of a mill ; and that defendants might pull down works about it, and be restricted from erecting others : demurrer, because plaintiff had not established his right at law, allowed." The case of *The Earl of Darlington v. Bowes*, 1 Eden, 270, was an application for an injunction after one verdict and judgment. It was said, "there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only." So, in the case of *Patterson v. McCamant*, 28 Mo. 210, it was

[Lehman, Durr &amp; Co. v. Shook.]

said: "A bill of peace to restrain a person from instituting ejectment suits against another, on the ground that such suits would be vexatious, can not be maintained, unless the title to the land in dispute has been fully and satisfactorily litigated at law." In the body of the opinion it is said: "We have not been able to perceive any principle upon which the decree in this case can stand. The principle asserted in the bill and carried out by the decree is, that a court of equity will interpose its authority by perpetual injunction in favor of a person in possession of land, whose title is threatened by another person holding a worthless claim to the same land, where the person holding the adverse title is insolvent, and he has already brought two suits in ejectment, and caused them to be dismissed, or taken non-suits. . . . There are two kinds of bills of peace, and only two kinds." The first class he characterizes as bills to prevent a multiplicity of suits. This case presents none of the essentials of a bill of that class. The opinion proceeds: "Another class of cases is where the title has been fully and satisfactorily litigated at law. To put a stop to vexatious suits, which courts of law can not do, equity will interpose by injunction." *Knowles v. Inches*, 12 Cal. 212, is to the same effect. And such, I may add, are all the authorities. I have not found a single case where relief was granted on a bill such as this, while there is an overwhelming weight of authority against the maintenance of such a bill.—*Leading Cases in Eq.*, Vol. 2, Part 2 (Earl of Oxford's Case), 1349.

But how stands the question on principle? A few authorities hold that one out of possession, but claiming a legal title, may file a bill to remove the cloud his adversary's title creates, to have his title quieted, and to be let into possession.—*Almond v. Hicks*, 3 Head, 39; *Bunce v. Gallagher*, 5 Blatchf. 481; *Thompson v. Lynch*, 29 Cal. 189. We have declined to follow those cases.—*Smith v. Cockrell*, *supra*, and see other cases cited *supra*. Now, the ruling of my brother, the Chief Justice, is, that, although by the Shooks' suit in ejectment they have removed the principal ground on which courts of equity entertain bills to remove clouds from title—namely: that being in possession, the complainant can maintain no suit at law to test the title—yet, the right to have the adversary title delivered up and cancelled furnishes a special equity, which authorizes him to go into chancery to obtain full and adequate relief.

If this furnish a special equity, which will uphold a bill by the claimant who is in possession, why will it not equally maintain a bill by one who asserts legal title, but who is out of possession? If the exercise of such power is necessary to give adequate and complete redress to the litigant in possession, why is it not equally necessary to give adequate relief to his adversary

[Lehman, Durr &amp; Co. v. Shook.]

out of possession? Can there be a difference in the measure of relief the several parties are entitled to, dependent on the accident of possession? And if we accord this right to the defendant, because he is in possession, and deny it to him who is out of possession, do we not discriminate against the latter, by confining him to one mode of redress—an action at law—and to incomplete relief, leaving his adversary's title outstanding and uncanceled, while to the former, we give the option of defending at law, or of arresting the proceedings in the law court, and having the several titles pronounced upon by the chancellor, and of compelling his adversary to surrender up his title to be cancelled? Can that be a sound principle which works such unequal results? In *Smith v. Cockrell*, *supra*, we denied the relief here prayed, because the complainant was out of possession. His asserted title being in form legal, we ruled there was no impediment in his way, to prevent him from recovering in an action at law, if he had the better title; and we denied him relief on his bill.

In what is said above, I am dealing with legal titles. If the plaintiff's claim, or the defendant's defense be equitable, or if either claim rest on an estoppel *in pais*, this gives the court of chancery jurisdiction to inquire of and make available such equitable claim or defense.—1 Brick. Dig. 627; *Ib.* 796, § 7; *You v. Flinn*. 34 Ala. 409. And there may be special equities, which would give the chancery court jurisdiction, in cases other than these.

It is doubtful if what is stated above does not conflict to some extent with some of the utterances found in *Ray v. Womble*, 56 Ala. 32. To that extent, I desire to express my disapprobation of that case. See also *Lockett v. Hurt*, 57 Ala. 198. An expression stated *arguendo* in *Peirsoll v. Elliott*, 6 Pet. 95, goes somewhat to sustain *Lockett v. Hurt*. I express no decided opinion on the question there raised. Should the question come again before us, I think section 2969 of the Code of 1876, should be considered in its bearings on the question decided in *Lockett v. Hurt*. I only throw out this suggestion, without intending to intimate an opinion upon it.

My brother, Somerville, as I understand his views, does not differ with me in what is said above. He at least expresses no dissent from them. The bill of Lehman, Durr & Co. charges that the title, under which the Shook ejectionment-suit was brought, is fraudulent as against them. I think it may be conceded this charge is supported by the testimony. Following his views, as expressed in his dissenting opinion in *Smith v. Cockrell*, *supra*, he holds that this fraud furnishes a special equity, which will uphold the present bill. In that case I expressed my non-concurrence in his views, and the Chief Justice fully concurred



[Lehman, Durr & Co. v. Shook.]

with me. He, in common with the Chief Justice, thinks the bill in this case contains equity, but in the grounds on which they rest their several opinions, they are widely at issue. The equity on which the Chief Justice rests his opinion, is, in my judgment, unsound, and in this Justice Somerville agrees with me. So, the equity on which Justice Somerville bases his opinion, I hold to be equally untenable, and in this view the Chief Justice concurs with me. Still, two members of the court think the bill contains equity, and that the chancellor erred in dismissing it. What should be our decision? I do not think this is a case, where two or more judges reach the same conclusion, but for different reasons. That principle I think applies, and properly applies, where the same conclusion of fact or law is reached, but by different processes of reasoning. Here the inquiry is one of law, and my brothers do not agree in their conclusion. The conclusion of law arrived at by each, is a minority opinion in this court. To test this, let us suppose two bills are filed, one resting the equity on the ground relied on by the Chief Justice, and the other, on the ground on which Justice Somerville bases his opinion. It is manifest we would hold each bill wanting in equity. Can two differing minority opinions become a majority opinion? We, in this investigation, are pronouncing on questions of law. Can the finger be pointed to any legal principle, declared in this case, which will maintain the equity of the bill? Certainly not; for each of the grounds relied on is pronounced by a majority of this court to be unsound. And when this case returns to the chancellor, if we reverse it, how is he to determine there is equity in the bill, and on what ground? The equity rests on two grounds, neither of which derives any support from the other, and each of which grounds is unsound, according to the judgment of a majority of this court. Our decisions ought to be rules of action, and rest on principles which command the assent of at least a majority of the court.

In my opinion, the decree of the chancellor ought to be affirmed; affirmed on principle, and affirmed as the logical result of our differing opinions.

## Kingsbury v. Milner.

### *Bill in Equity to Enforce Vendor's Lien.*

1. *Bill to enforce vendor's lien; abatement of damages resulting from breach of warranty.*—The measure of damages for a breach of a warranty in the sale of lands, on eviction under an outstanding paramount title, is the purchase-money, or consideration, with interest, and the costs of the ejectment suit; and on a bill filed to enforce the vendor's lien for an unpaid balance of the purchase-money, an abatement of the amount of such damages may be allowed.

2. *Same.*—A bill filed to enforce a vendor's lien for an unpaid balance of purchase-money against the vendee, who holds the vendor's deed with warranty, or a bond for title, is entirely devoid of equity, when it shows by its averments, that the vendee had suffered damages by reason of an eviction under an outstanding paramount title, in an amount exceeding the amount claimed in the bill.

3. *Amendment to bill in equity; right of, when must be claimed.*—The general rule, under the statute, is that the right of amendment to a bill in equity must be claimed in the lower court, and that the question can not be raised in this court for the first time.

4. *When opportunity to amend must be afforded in lower court.*—But this rule is confined to cases in which the complainant had an opportunity to claim the right; and hence, a decree rendered in vacation on demurrer, dismissing the bill, without first affording the complainant an opportunity to amend, is erroneous, and, on appeal, this court will reverse the decree and remand the cause, that the appellant may amend his bill, if he so elect.

APPEAL from Butler Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The bill in this cause was filed by John Kingsbury against John T. Milner and Henry W. Caldwell, for the purpose stated in the opinion. It appears from the averments of the bill, that in 1866, the appellant, by two separate contracts, sold to the appellees two tracts of land in Butler county, one containing 640 acres, and the other, 240 acres, both of which were mainly valuable for the pine timber thereon; that the tract containing 640 acres was sold for \$3200, of which \$2200 was paid in cash and the balance was payable on 1st January, 1867; that appellant executed and delivered to appellees a bond, conditioned to make them title to this tract on payment by them of the balance of the purchase-money; that in January, 1867, the appellant "signed and sealed" a deed to this tract, with warranty, and left same with an agent with instructions to deliver it to the appellees when they paid the balance of the purchase-money, and not otherwise, but that afterwards, by means unknown to

[Kingsbury v. Milner.]

appellant, they obtained possession of said deed, without having first paid said purchase-money, and without the authority of appellant; that the appellant executed a deed conveying the tract containing 240 acres to the appellees when they made the purchase, with covenant of warranty; that the price of this tract was \$1200, which, it is claimed by the bill, has never been paid; that the appellees took possession of both of said tracts soon after their said purchases, and cut off of said lands and used all the valuable timber thereon, of the value of about \$4000, and that the lands without the timber are of but little value. It is also shown by the bill, that the appellees were evicted from the tract containing 240 acres and of one-half of the other tract in January, 1878, in the manner stated in the opinion, and that the appellees had brought two suits at law to recover damages for breaches of covenants of warranty contained in said deeds. The appellees interposed a demurrer to the bill attacking the equity thereof on several grounds, which it is unnecessary to set out, and the Chancery Court sustained the demurrer and dismissed the bill. The decree dismissing the bill was rendered in vacation. This decree is here assigned as error.

WATTS & SONS, JOHN GAMBLE and J. C. RICHARDSON, for appellant.

BUELL & LANE, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—This is a bill filed by the appellant to enforce a vendor's lien on certain lands sold by him to the appellees. It seeks also, incidentally, to enjoin the suits at law instituted by appellees for alleged breaches of warranty of the title of the same lands, and to recover damages for the cutting by defendants of a large quantity of timber removed from the land in controversy. There are two separate tracts of this land, one containing two hundred and forty acres, and the other six hundred and forty acres.

So far, in the first place, as concerns the 240 acre tract, which was sold in April, 1866, it is sufficient to say, that the title itself shows an entire failure of consideration. The title of this land is admitted to have proved defective, the premises having been recovered from the vendees by paramount title in an action of ejectment, without any alleged fault or collusion on their part. The purchasers having been thus dispossessed by a superior title, and the deed of conveyance containing a warranty, it is clear that the effort to enforce collection of the note given for the purchase-money is inequitable.



[Kingsbury v. Milner.]

And the same is true of half of the 640 acre tract, which was sold in January of the same year. Three hundred and twenty acres of this tract were recovered from appellees in an action of ejectment instituted by the heirs of one Roberts, who also obtained a judgment in the same suit for over nine hundred dollars, by way of rent or mesne profits. The amount of purchase-money sought to be enforced against this tract is about one thousand dollars. The relative value of these two half sections of land is not averred in the bill, and being equal in area, the presumption of equality is not unfair. Indulging such a conclusion, it is plain that the complainant would be indebted to the defendants in a *larger sum than they owed him*, by reason of the abatement necessary to be made in the original purchase-money of the land. The price of the land being five dollars per acre, the half section from which the defendants were evicted would be worth the sum of sixteen hundred dollars, or six hundred dollars more than complainants claim, saying nothing of interest, and costs of suit. In actions for the recovery of damages based on a broken covenant of warranty, in case of eviction, the better rule is, that the measure of damages would be the purchase-money, or consideration, with interest, and the costs of the ejectment suit. *Bibb v. Freeman*, 59 Ala. 612; *Pitcher v. Livingston*, 4 Amer. Dec. 229; *Markland v. Crump*, 27 *Ib.* 230; 1 Sedgwick Dam. (7th Ed.) p. 316, (157-8); 2 Greenl. Ev. § 264. An abatement of a like sum can be enforced in this action, but the damages for mesne profits could not be included.—*Staats v. Ten Eyck*, 2 Amer. Dec. 254.

It requires no argument to show that a bill seeking to enforce such a claim is entirely devoid of equity. The bill admits the fact of defendants' eviction by paramount title, and the fact of warranty, and yet seeks to enforce payment of the entire purchase-money. It is in the very teeth of the fundamental principle of every court of conscience, that he who seeks equity must do equity.

The allegation that the deed for one of the tracts of land was delivered by appellant's agent to the appellees, without authority and against instructions, gives no equity to the bill. Conceding the truth of this averment, the deed would be without validity, and the action on its alleged breaches of covenant for warranty could be adequately defended at law.—*Fuller v. Hollis*, 57 Ala. 435.

The claim for damages urged in the bill for timber cut on the land by the vendees, is entirely untenable. The consideration agreed on was for both the land *and the timber*, the latter being of course a part of the realty. It is obvious that no additional claim can be preferred for the timber.

[Kingsbury v. Milner.]

We see no error in the decree of the chancellor sustaining the demurrer to the bill, and dissolving the injunction.

The chancellor erred, however, in dismissing the bill without first affording complainant the opportunity of amendment. This dismissal was *in vacation*, the cause having been submitted for decree on demurrer.

The general rule is now firmly settled, that, under our statutes, the right of amendment is a privilege which must be claimed in due time by the party entitled to it, and in the absence of a timely request for such permission, by motion in the primary court, the question can not be raised for the first time in the appellate court.—*Brock v. S. & N. R. R. Co.*, 65 Ala. 79; *Guilford v. Kendall*, 42 Ala. 651.

But this rule should, in our judgment, be confined to cases where the party complaining of injury *has had some opportunity of claiming the privilege*, which can not be when the dismissal is in vacation. In *Bishop v. Wood*, 59 Ala. 253, the principle was so announced as applicable to cases where the equity of a bill was drawn in question incidentally, though a *dictum* occurs intimating a contrary rule where the equity of a bill is assailed on demurrer. This might be reasonable if the decree were rendered in term time, when the parties are presumed to be present, for then the privilege of amendment could at once be claimed. But, in our opinion, it is and should be otherwise, when the action of the chancellor is taken in vacation, under the provisions of the statute, or the rule of practice authorizing such decrees.—Code, 1876, §§ 3896–97; Rule 80, p. 172, Code.

The appellant had a right to have the judgment of the court on his demurrer. The whole system of amendments is based upon this theory, and without it the privilege of amendment would be futile. To hold otherwise would be, in effect, to adopt the legal dogma of professional infallibility, which would render nugatory the necessity of all such amendments. The language of the statute is general in terms, that “either before or *after judgment on demurrer*, the court *must* permit an amendment of the pleadings, and such amendment must cause no delay in the trial of the cause, unless injustice would thereby be done.”—Code, § 3006. It was announced in *Little v. Snedecor*, 52 Ala. 167, 170, as a general rule, that the better practice is not to dismiss a bill without tendering the opportunity to amend, and that “such a practice would best comport with the spirit of our liberal statute of amendments.” The register in chancery is authorized, on notice to the opposing party, to allow such amendments, so as not unnecessarily to delay the cause.—Code, § 3791.

We hold, therefore, that when a cause is submitted for de-

[Munchus v. Harris.]

cree *in vacation*, the bill should not be dismissed without affording the opportunity of amendment.

For this error of the chancellor the decree must be reversed and the cause remanded, that the appellant may have the privilege of amending his bill, if he so elect.

## Munchus v. Harris.

### *Bill in Equity by Widow for Specific Performance of Contract of Purchase by Deceased Husband of Homestead.*

1. *Homestead exemption in favor of widow ; by what law determined.* Except as against creditors of a decedent, the right of the widow to a homestead exemption is determined by the law in force at the time of the decedent's death.

2. *Same ; may be carried out of equitable estate.*—An equitable title, which the husband had in the homestead, at the time of his death, under a contract of purchase, under which a part of the purchase-money had been paid, but no conveyance of the legal title made, will support a right in the widow (there being no minor children) to a homestead exemption ; and such homestead is protected, as against third persons, from levy and sale.

3. *Homestead exemption in favor of widow ; when not affected by removal from the State.*—Under the act of April 23d, 1873, if a man die leaving a widow, but no minor children, and, at the time of his death, he was a resident of this State, and then occupied as a homestead a house and lot, which, under the act, was exempt to him, the right of the widow to a homestead exemption in the lot, as defined by the provisions of the act, attached on the death of the husband ; and this right, so far, at least, as concerned the decedent's creditors, was not destroyed by her subsequent removal from the State.

4. *Homestead exemption ; extent of, under act of April 23, 1873.*—The homestead exemption in favor of the surviving widow and minor child or children, provided by the act of April 23d, 1873, extended only to a mere retention by them of the possession of the homestead, until it was "ascertained whether the estate was solvent or insolvent ;" and it only *vested* in them absolutely in the event of the insolvency of the estate. The ascertainment of insolvency contemplated by the act, was a regular declaration of insolvency by proceedings in the probate court—a *judicial ascertainment* according to the statutory practice regulating such a procedure.

5. *Allegations and proof ; when there is a variance.*—There is a fatal variance between the allegations and proof, when, in the bill, filed by a surviving widow, whose husband died while the exemption act of April 23d, 1873, was of force, leaving no minor children, in which she seeks the specific performance of a contract of purchase made by the husband of a house and lot, which he occupied at the time of his death as a homestead, and which was exempt to him, as such, under the act, the complainant claims the entire ownership of the title of which the husband died seized, while the proof shows, that the husband's estate had not been judicially ascertained to be insolvent, and, therefore, her ownership was only a right



[Munchus v. Harris.]

to retain the homestead, as against ordinary creditors and the heirs, until the fact of insolvency has been so ascertained.

6. *Decree dismissing bill absolutely for variance between the allegations and proof; when this court will reverse, and enter decree dismissing bill without prejudice.*—A decree of the chancery court dismissing a bill on account of a fatal variance between the allegations and proof, which may possibly be remedied by amendment, will, on appeal, be reversed by this court, and a decree here entered dismissing the bill without prejudice.

#### APPEAL from Butler Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in this cause was filed by Anna W. Munchus against Emily E. Harris, and Jonas W. Jones, as the administrator of the estate of Joseph K. Munchus, deceased, for the purpose stated in the opinion. Munchus died in October, 1873, leaving him surviving his widow, the complainant, and three adult, but no minor children. At the time the bill was filed his estate had not been declared insolvent. An amendment to the bill, which was taken as confessed, by decree *pro confesso*, averred, that the estate was in fact insolvent. The original bill was filed on 12th January, 1876. The evidence shows that the complainant, at some time during that month, moved to Texas, but whether before or after the bill was filed, is not clear. The other facts are sufficiently stated in the opinion. On the hearing had on the pleadings and proof, the chancellor was of the opinion, that the complainant had lost her right to relief by her change of residence, and caused a decree to be entered dismissing the bill absolutely and unconditionally as to her, but "without prejudice to the rights of the legal representative or creditors of the estate of J. K. Munchus, deceased." This decree is here assigned as error.

HERBERT & BUELL, for appellant.—(1). Appellant's husband having died in October, 1873, appellant's exemption rights, as his widow, are to be determined by the statute then in force, which was the act of April 23d, 1873 (Pamph. Acts, 1872-3, p. 64).—*Rottenberry v. Pipes*, 53 Ala. 447; *Taylor v. Taylor*, *Ib.* 135. Appellant having selected the homestead, and having tendered the balance due for the lot, and it being established by the amended bill and the decree *pro confesso* thereon, that the estate of Munchus is insolvent, her right to have the title conveyed to her became perfect and complete. (2). She did not forfeit this right by her removal to Texas pending her suit. The act of April 23d, 1873, does not limit a homestead exemption in favor of the widow and minor children to residents of this State, or to those who continue as such; nor does it require *occupancy* of the premises so exempted, differing materially in this respect from the statutes exempting homesteads from sale under execution. The homestead, under that act, is exempt.

[Munchus v. Harris.]

from the payment of decedent's debts; and if his estate is insolvent, it is also exempt from the claims of *heirs*. It follows, that if there was a forfeiture, the title is in *abeyance*, and the homestead belongs to nobody. Cases cited on this proposition: *Johnson v. Gaylord*, 41 Iowa, 362; *Green v. Crow*, 17 Texas, 180; *Reeves v. Petty*, 44 Texas, 249. (3). The equity to the homestead under the contract of purchase will support appellant's claim of exemption.—*Weber v. Short*, 55 Ala. 311; *Thompson on Homestead*, §§ 170, 171, 172.

GAMBLE & BOLLING, *contra*.—(1). The bill in this cause was filed on 12th January, 1876. The proof shows that appellant moved to Texas during the month of January, but it is not shown whether she moved before or after she filed her bill. Her removal to Texas was a change of domicile, a voluntary abandonment of the homestead, and a forfeiture of any claim of exemption she may have had.—*McConnaughy v. Baxter*, 55 Ala. 379; *Boyd v. Beck*, 29 Ala. 703; 13 Ala. 805; *Miller v. Marx*, 55 Ala. 330, and authorities cited; *Keiffer v. Barney*, 31 Ala. 192; *Boykin v. Edwards*, 21 Ala. 261; *Alston v. Ulman*, 39 Tex. 157; *Jordan v. Godman*, 19 Tex. 275; *Thompson on Homestead*, §§ 91, 93, 263, 284; *Trawick v. Harris*, 8 Tex. 312; *Finley v. Sly*, 44 Ind. 269; *Bell v. Schwarz*, 37 Texas, 572; *Austin v. Stanley*, 46 N. H. 51; *Jarvais v. Moe*, 38 Wis. 448; *Harper v. Forbes*, 15 Cal. 202. (2). The husband not having paid all the purchase-money, he did not, at the time of his death, have a perfect equity in the lot occupied by him as a homestead; and he not having the legal title, we insist, that the lot was not the subject of a homestead exemption in favor of appellant.—*Thompson on Homestead*, § 167, and authorities cited in note 1.

SOMERVILLE, J.—The bill in this case is one for specific performance. It is filed by the appellant, Anna W. Munchus, as the widow of J. K. Munchus, deceased, to compel the appellee, Emily E. Harris, to convey to her the title of decedent's homestead, which he is alleged to have purchased, but not entirely paid for, prior to his death. The offer of the bill is to pay the unpaid balance of the purchase-money, and the prayer is for a conveyance by the vendor to appellant. It is shown that the decedent left surviving him his widow, and three adult children. The latter, though heirs, are not made parties, but no objection seems to have been taken on this ground.

As the intestate died in October, 1873, the rights of the appellant are to be determined by the act of April 23d, 1873, which was the law in force at this date, regulating the subject of exemptions, although, as against *creditors* of the decedent,

[Munchus v. Harris.]

the law in force at the time of the creation of a debt by contract would govern.—*Davis v. Davis*, 63 Ala. 293; *Rottenberry v. Pipes*, 53 Ala. 447.

The theory of the bill is that the title of which the intestate died seized vested absolutely in the widow, and that the heirs had no interest. Conceding that the allegations of the bill were true, they showed an equitable title in the land to have been in the deceased, under a contract of purchase, and this would be that character of estate from which a homestead could be carved, and which would be protected from levy and sale as against third persons.—*Weber v. Short*, 55 Ala. 319; *Blue v. Blue*, 38 Ill. 10; *Thomp. on Homestead & Ex.* §§ 170–1. Nor was it necessary, as the decree of the chancellor assumes, that the complainant should have been in actual occupancy of the property at the time of the filing of the bill. If the decedent was a resident of the State, at the date of his death, and then occupied the house and lot in question as a homestead, this would fulfill the requirements of the statute, so far as concerns, at least, the creditors of the deceased.—*Green v. Crow*, 17 Tex. Rep. 180.

There is a fatal variance, we think, between the allegations of the bill as to the complainant's ownership or claim of interest in the property in question, and the proof in the case. The claim set up in the bill is the entire ownership of the decedent's title of which he died possessed, free from the claim of the heirs. The ownership proved is only a right on appellant's part to *retain* the homestead, as against ordinary creditors and against the heirs, until the insolvency of the estate is ascertained.

The exemption law in force at the time of Munchus' death provided for a homestead exemption for the benefit of the widow, and any minor child or children, who might survive him, and allowed the premises, not exceeding two thousand dollars in value, to be "retained" by them until it was "ascertained whether the estate was solvent or insolvent;" and if the estate was proved to be insolvent, it *vested* in them absolutely.—Acts 1872–3, §§ 3 and 15, pp. 65, 69; *Miller v. Marx*, 55 Ala. 322.

It was decided, at the present term, in the case of *Baker v. Keith*, that the ascertainment of insolvency, referred to in this act, is a regular declaration of insolvency by proceedings in the probate court, *judicially ascertained* according to the statutory practice regulating such a procedure. We adhere to the rule there announced. There may, perhaps, be cases of collusion, or such gross dereliction of duty on the part of an administrator so closely allied to fraud, as would, on proper averment and proof, take a case out of the operation of this rule, and dispense with the necessity of an actual declaration of insolvency. This point is not, however, before us for decision.



[Slaughter v. McBride and Latimer.]

For the variance above mentioned between the *allegata* and *probata*, the dismissal of complainant's bill may be considered as free from error. This point, and the materiality of such a variance, are fully settled by the past decisions of this court, which we refer to without discussion.—*Winter v. Merrick & Sons*, ante, 86; *Crabb v. Thomas*, 25 Ala. 212; *Larkins v. Biddle*, 21 Ala. 252.

As these defects may be remedied possibly by amendment, it was proper to dismiss the bill without prejudice, and the chancellor having failed to do this, we feel it to be our duty, pursuant to the usual practice of this court in such cases, to reverse the decree of the chancellor, and render the decree here which he should have done. The decree is accordingly reversed, and the bill is here dismissed, at the cost of the appellant, without prejudice to the rights of complainant or other interested parties.—*Cameron v. Abbott*, 30 Ala 416.

## Slaughter v. McBride and Latimer.

### *Ejectment.*

1. *Homestead exemption by widow; what law governs.*—The surviving widow's claim of homestead exemption takes effect at the death of the husband, and is controlled by the law then of force, with the single qualification that, as against debts of the husband, it is governed in quantity by the laws of force when the debt was contracted.

2. *Same.*—A widow, whose husband died after the passage of the act of April 23, 1873, by which all former exemption statutes were repealed, and prior to the passage of the act of February 9, 1877, by which such statutes were re-enacted, is entitled to no homestead exemptions whatever, as against a debt of her husband which was contracted before the constitution of 1868 became binding.

3. *Ejectment; what title will support.*—Ejectment can only be maintained on a legal title and right to the immediate possession.

4. *Deed of homestead; when void.*—A deed, executed by a married man of his homestead after the constitution of 1868 went into effect, without the voluntary signature and assent of his wife, is void as a conveyance of the legal title, although the deed was executed in payment of a debt contracted by him in 1859; and it will not, therefore, support an action of ejectment brought by the grantee, after the death of the grantor, against the surviving widow of the latter, for the recovery of such homestead.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

Ejectment by J. B. and Georgia Ann Slaughter against McBride and Latimer, for the recovery of a tract of land in the

[Slaughter v. McBride and Latimer.]

possession of McBride, as tenant of Latimer. The facts are stated in the opinion. The Circuit Court charged the jury on the written request of the defendants, that if they believed the evidence, they must find for the defendants, and refused a charge asked by the plaintiffs in writing, instructing the jury, that, if they believed the evidence, they must find for the plaintiffs. The charge given and the refusal to charge as requested, were separately excepted to by the plaintiffs, and are here assigned as error.

SHAVER & HUTCHESON, for appellants. (No brief came to the hands of the reporter.)

H. C. TOMPKINS, *contra*. The constitution of 1868 declares every mortgage or *other alienation* of the homestead is void, unless it has the voluntary assent and signature of the wife. This provision does not merely provide for an exemption, but it establishes a rule of conveyance.—Con. of 1868, Art. xix, § 2; *Kennedy v. Stacey*, 1 Baxter, 220; Thompson's Homestead and Exemptions, § 474.

STONE, J.—The plaintiff, Georgia Ann Slaughter, *nee* Latimer, asserts claim to the land in controversy under a deed executed by Joel Latimer in 1869. At that time Joel Latimer resided on the lands as a homestead, and continued to reside upon them until his death in 1874. When said conveyance was executed, Joel Latimer was a married man, and his wife did not join him in the conveyance. She survived him, and defends this suit as landlord, claiming a right to the possession. The tract of land sued for contains only seventy acres, and when the deed was executed, its value did not exceed five hundred dollars.

The deed from Joel Latimer to Georgia Ann Slaughter recites as its consideration, that he, Joel, in 1859 became administrator of the estate of said Georgia Ann's father, of which she, the said Georgia Ann, was sole distributee, and that as such administrator he had received a large sum of money—\$5,000 or more—which he had never paid or accounted for. This money was received by Joel in 1859, and the conveyance was made in partial payment of it.

It is settled by our decisions that the surviving widow's claim of homestead exemption takes effect at the death of the husband, and is controlled by the law then of force, with the single qualification that, as against debts of the husband, it is governed in quantity by the law of force when the debt was contracted.

*Watts v. Burnett*, 56 Ala. 340; *Wilson v. Brown*, 58 Ala. 62; *Blum v. Carter*, 63 Ala. 235; *Giddens v. Williamson*, 65

[Slaughter v. McBride and Latimer.]

Ala. 439. Now, as the debt of Latimer to Mrs. Slaughter was contracted before the constitution of 1868 became binding, and Mr. Latimer died after the act of April 23, 1873, had repealed all former exemption statutes, and before they were re-enacted, February 9th, 1877,—Code of 1876, § 2844—it follows that as against Mrs. Slaughter's claim, Mrs. Latimer is entitled to no homestead exemption whatever. This, because at the time her homestead exemption accrued by her husband's death in 1874, there was no statute in force which secured exemptions against debts contracted before the constitution of 1868 became binding.—*Lovell v. Webb*, 62 Ala. 271.

The present action, however, is brought, and can be maintained only on Mr. Latimer's deed, which bears date in 1869. Ejectment can only be maintained on a legal title and right to the immediate possession. Mrs. Slaughter must recover on her deed, or she can not recover at all; and her right of recovery must date from the date of her deed. The law courts can deal only with legal rights, and can enforce only legal remedies. The fact that the land in controversy can, by proper proceedings, be made subject to a debt contracted in 1859, can not aid a legal title which dates only from 1869. Till that deed was made Mrs. Slaughter had no *jus in re*. As a muniment of title to support an action of ejectment, that conveyance was void under the constitution of 1868, because it was Latimer's homestead, and was executed without the voluntary signature and assent of his wife.—*Miller v. Marx*, 55 Ala. 322; *McGuire v. Van Pelt*, *Id.* 344.

Affirmed.

At a subsequent day of the term, the appellants, by their attorneys, SHAVER & HUTCHESON, applied for a rehearing, in support of which they contended as follows: (1). The debt in payment of which this deed was executed, was contracted prior to the constitution of 1868, namely, in 1859. The deed was made in 1869, after the constitution became binding. At the time the debt was contracted, no mode of alienation of the homestead was prescribed, and the husband could convey without the wife's signature and assent. To pronounce the deed void, because it does not conform to the mode of alienation prescribed by the constitution of 1868, is to make that provision of the constitution retroactive. But such a construction would impair the obligation of contracts, and hence, would be violative of the Federal constitution.—Thomp. on Hom. §§ 10, 11, 12, 292, 469; *Gunn v. Barry*, 16 Wall. 610; *Edwards v. Kearzey*, 96 U. S. 595. (2). "A conveyance to secure a debt which is *privileged* against the homestead exemption will pass the right of homestead, although the signature of the wife is



[Slaughter v. McBride and Latimer.]

imperfectly acknowledged or attested, or although the wife does not join in the deed at all, *since, as to such debt, there is no homestead exemption.*”—Thomp. on Hom. § 469; *Wood v. Lord*, 51 N. H. 448; *Strachn v. Foss*, 42 N. H. 46; *Burnside v. Terry*, 51 Ga. 186. (3). The homestead exemption clause of the constitution of 1868, by express terms, applies to “any debt contracted *since the 13th day of July, 1868, or after the ratification of this constitution.*” And it further provides that “*such exemption*, however, shall not extend to any mortgage lawfully obtained, but such mortgage or other alienation of *such homestead*, by the owner thereof, if a married man, shall not be valid without the voluntary signature and assent of the wife of the same.” Here we have a single section of the constitution creating and defining a homestead and limiting it to certain debts in the first part, and prescribing a mode of alienation of *such homestead* at the conclusion. The words, *such homestead*, necessarily refer to the homestead therein created and defined. As to debts contracted prior to the dates mentioned in the constitution, *such homestead* did not exist; but as to those debts, *another homestead* existed, and no mode of alienation of *that* homestead has ever been enjoined. The mode of conveyance is expressly limited to the homestead therein created. *Expressum facit cessare tacitum.* There is no reason for holding that the first part of the constitutional provision under consideration has merely a *prospective* operation, and that the the remainder is *retrospective* in its operation. (4). There are two homesteads recognized by the law, the homestead of the husband or head of the family and the widow’s homestead. The husband’s homestead terminates at his death; the widow’s vests at that time and is dependent upon the law then of force. The husband’s homestead, then, is a life estate; but in the conveyance in this case, the husband reserves a life estate in the land conveyed—hence he does not convey his homestead, and at his death in 1874, under the law then in force, the widow was entitled to no homestead as against a debt contracted before the constitution of 1868 became binding, and hence there was then nothing to prevent the conveyance of the remainder in fee taking effect.—Thom. on Homestead and Exemptions, § 543; *Lovelace v. Webb*, 62 Ala. 271.

STONE, J.—In response to the application for a rehearing, we will add, that the ruling in this case does not go the length of holding that the plaintiff is without remedy to subject the land in controversy to her demand. It simply rules that she can not maintain ejectment on the title she has. An action of ejectment is not so framed, as to furnish the necessary machinery for the purpose. The present suit shows the inaptness of

[Slaughter v. McBride and Latimer.]

this remedy to secure the relief the plaintiff claims. The deed, dated in 1869, shows a *prima facie* title in the plaintiff. Proof that when the deed was executed, Latimer, the grantor, was a married man, resided on the premises, and that his wife did not join in the conveyance, overturns that presumption, and, in the absence of other proof, shows the deed was void. How is this proposed to be met? By showing that the consideration on which the deed was executed was an indebtedness of the grantor, incurred before the constitution of 1868 went into operation, and therefore Mrs. Latimer has no homestead right. The question of such anterior indebtedness is one of fact, and disputable. What issue would this present? In an action of ejectment, to determine the relative strength of the rival titles of Mrs. Slaughter and Mrs. Latimer to a tract of land, the real contention would be whether Mr. Latimer was indebted to Mrs. Slaughter, and the date of such indebtedness.

As we intimated in the opinion in chief, until Latimer executed the deed to Mrs. Slaughter in 1869, she had no title or claim, legal or equitable, to the land. If she had then held an equitable title, equity would have enforced it, and converted it into a legal title. And if such had been the status of the land in controversy, Latimer might, by conveyance executed by him, have clothed her with a legal title; for whatever equity will order to be done, it will approve as well done, when accomplished by parties themselves. But that is not this case. Before the execution of Latimer's deed, equity would not and could not have coerced the conveyance to Mrs. Slaughter. She had no right in the land. She had neither *jus ad rem*, nor *jus in re*; and she had no lien on the land. The extent of her rights in the premises was, that so long as Latimer remained the owner of the land, she could, by legal process, have it sold in payment of her demand.

We have been referred to the case of *Strachn v. Foss*, 42 N. H. 43. That was a proceeding in equity, instituted by the claimant of homestead exemption. It sought affirmative relief, and failed to show an equitable right to it. In the case of *Wood v. Lord*, 51 N. H. 448, the claimant of homestead was also the actor, and prayed relief. Those cases are unlike this. The petition for rehearing must be denied.

## Pollock & Co. v. Hill, Assignee.

*Bill in Equity by Assignee in Bankruptcy to have Conveyance of Land Set aside and Cancelled.*

1. *Bankruptcy; right of assignee, prior to adoption of Revised Statutes, to bring suit in State courts.*—Prior to the adoption of the Revised Statutes of the United States, the chancery courts of this State had jurisdiction to entertain a bill filed by an assignee in bankruptcy, to assail and set aside transfers of property made by the bankrupt in fraud of the rights of his creditors, or in fraud of the assignee as their trustee, or fiduciary representative.

2. *Same; when jurisdiction of Federal courts exclusive.*—Since the adoption of the Revised Statutes, June 22d, 1874, and the act amendatory of the bankrupt act of 1867, approved on same day, the jurisdiction of the Federal courts has been exclusive as to all actions instituted by an assignee in bankruptcy for the recovery or collection of the assets of the bankrupt, except in cases coming within the influence of the exception created by the amendment.

3. *Same; when State courts may take jurisdiction.*—In such cases the State courts may take jurisdiction, under the exception created by the amendment, when the amount in controversy does not exceed five hundred dollars, and the Federal court in which the proceedings in bankruptcy are pending, has authorized or directed the assignee to sue in the State courts.

### APPEAL from Jefferson Chancery Court.

Heard before Hon. CHARLES TURNER.

The bill in this cause was filed on the 24th of April, 1879, by H. L. Hill, as the assignee in bankruptcy of D. F. Constantine, the appellee, against J. Pollock & Co., the appellants, to have delivered up and cancelled a deed executed by the bankrupt on the 2d of March, 1878, and during the pendency of proceedings in bankruptcy against him, conveying to the appellants certain real estate situate in Birmingham. It is shown by the averments of the bill and exhibits thereto, and also by the proof, that on the 23d of February, 1878, the requisite number of creditors under the bankrupt law filed their petition in the District Court of the United States for the Northern District of Mississippi, to have D. F. Constantine and one S. S. Fields, his partner, declared and decreed bankrupts; that on the 24th of April, 1878, said District Court entered a decree, declaring and adjudging the said Constantine and Fields bankrupts, and appointing the appellee as the assignee of their estates in bankruptcy; and that on the 3d of June, 1878, the register of said court executed to the assignee an assignment of all the property



[Pollock &amp; Co. v. Hill, Assignee.]

and effects of said bankrupts under the provisions of the bankrupt law. The appellants were creditors of Constantine & Fields, and the deed was executed to them in payment of a part of what that firm owed them. The bill, after charging that the deed was inoperative as against the assignee because it was executed after proceedings in bankruptcy had been instituted, and while such proceedings were pending, also sets up a contemporaneous parol agreement to the effect, that the deed was delivered on condition that the title to the real estate described therein should not vest thereunder, until said District Court should determine that Constantine "was not a bankrupt, and until he had been discharged from the court as free of the charge, and proceedings of bankruptcy so instituted and pending in said court against him." The other facts are sufficiently stated in the opinion.

The Chancery Court overruled a demurrer filed to the bill, and on final hearing, had on pleadings and proof, decreed to the complainant the relief prayed. The decree overruling the demurrer and the decree on final hearing are here assigned as error.

RICE & WILEY, and J. T. GLAZE, for appellants.

J. T. TERRY, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—Prior to the adoption of the Revised Statutes of the United States, which was on June 22d, 1874, the chancery courts of this State had jurisdiction to entertain a bill filed by an assignee in bankruptcy, to assail and set aside transfers of property made by the bankrupt, in fraud of the rights of his creditors, or in fraud of the assignee as their trustee or fiduciary representative.—*Barnard v. Davis*, 54 Ala. 565; *Bradley v. Hunter*, 50 Ala. 265; *Clafin v. Houseman*, 93 U. S. 130; *Cook v. Whipple*, 14 Amer. Rep. 202 [S. C. 55 N. Y. 150].

Since the adoption of these statutes, however, and the enactment, on the same day, by Congress, of the law of June 22d, 1874, amendatory of the bankrupt act of 1867, the jurisdiction of the Federal courts has been exclusive as to all actions instituted by an assignee in bankruptcy for the recovery or collection of the assets of the bankrupt, unless such actions can be brought within the influence of the exception created by the amendment.—U. S. Stat. at Large, vol. 18, part 3, p. 178; Laws of U. S. p. 210, § 2.

In order to confer such jurisdiction upon the State courts, two prerequisites are essential. The *first* is, that the court have—  
VOL. LXIX.

[Williams v. Higgins.]

ing charge of the estate of the bankrupt, which is of course the court in which the bankrupt proceedings are pending, shall *authorize or direct* the assignee to sue in the State courts; and the *second* is, that the amount in controversy in such action shall not exceed the sum of *five hundred dollars*. This question was considered by this court in *Glover, Assignee, &c., v. Love*, 68 Ala. 219, where the conclusion above indicated was reached. See *Dodd v. Hammock*, 59 Ga. 403; *Sherwood v. Burns*, 58 Ind. 502; *Olcott v. Maclean*, 73 N. Y. 223.

In this cause the bill was filed in April, 1879, and the Chancery Court was, therefore, without jurisdiction over the subject-matter in controversy, under the principle above declared. The record shows that the fair value of the land conveyed by the bankrupt to the appellants was about *two thousand dollars*. It fails further to show that the assignee had any authority conferred on him by the bankrupt court to bring this suit in a *State* court. He was authorized and directed merely "to take charge of all the assets, real and personal, of said bankrupt in the State of Alabama, and to bring suit for the recovery of all real and personal property, *in the State of Alabama*, rightfully belonging to the estate of said bankrupt." There is nothing said here about suing in the State courts. No authority to this end is given to the assignee. Without the requisite order, the Federal courts in this State constituted the proper forum for the litigation here presented.

The chancellor erred, therefore, in taking jurisdiction of the case as made by the record. His decree must be reversed, and a decree is rendered in this court dismissing the complainant's bill at his cost.

## Williams v. Higgins.

### *Statutory Action in the Nature of Ejectment.*

1. *Delivery of deed can not be qualified by parol.*—When the possession of a deed to lands is obtained by the grantee from, and by the act of the grantor, or with his consent, it is not permissible for the grantor to prove by parol that the delivery of the deed was conditional or qualified, and not absolute. Any parol negotiation or agreement antecedent to, or contemporaneous with the delivery of the deed, is merged in the delivery, and from that time the conveyance becomes operative according to its terms.

2. *Deed; when want or inadequacy of consideration can not be shown.* Where a deed purports to be founded on a pecuniary consideration, it is not competent for the grantor, in the absence of fraud in its execution,

[Williams v. Higgins.]

to show in a court of law the want, or inadequacy of the consideration expressed in the deed.

3. *Same; deed fraudulent as to creditors, operative inter partes.*—Conveyances or gifts made to hinder, delay or defraud creditors, when fully consummated, are valid and operative between the parties; and neither party can set up the fraud for the purpose of maintaining, or defeating an action brought by the one against the other.

4. *Adverse possession; when fraudulent deed will not support a plea of.* Hostility to the title of the true owner is an essential element of adverse possession, and a possession can not be adverse, which in any contingency is intended to be in subservience and subordination to the true title.

5. *Same.*—Although the grantor in a deed made to hinder, delay or defraud his creditors, remained in the actual and continuous possession of the lands conveyed, taking the rents and profits; yet, such possession not being hostile to the title of the grantee, but being intended to be in subordination to it, if the grantor's creditors should seek to reach and subject the lands, it can not be adverse.

#### APPEAL from Pike Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a statutory real action in the nature of ejectment brought by R. J. Higgins, "as the receiver of the assets of S. A. & D. Williams," the appellee, against Z. H. Williams, the appellant, and was commenced on 13th September, 1879. The appellant, defendant in the Circuit Court, pleaded not guilty, and also suggested adverse possession for more than three years and the erection of valuable improvements on the premises. On the trial the appellee, plaintiff in the lower court, read in evidence a deed executed by the defendant and wife on 26th October, 1876, conveying to S. A. & D. Williams the lands sued for; and also a deed of assignment executed by S. A. & D. Williams to Thomas H. Beauchamp, as trustee for the benefit of their creditors, on 3d February, 1879, conveying, among other things, all their real estate; and also a deed executed by Beauchamp on 7th February, 1879, under the provisions of the deed of assignment, substituting the plaintiff as trustee in his stead, and conveying to the plaintiff the title obtained by him under the deed of assignment. The plaintiff then proved his appointment as receiver by the Chancery Court, on a bill filed therein for the purpose of carrying out, and executing the trusts created by the deed of assignment. The defendant was then examined as a witness in his own behalf, and testified, that "he had been in the actual possession of the land sued for six years, and was still in the actual possession thereof; that he had not quit the possession since he first went on the premises; that during the whole of said time he claimed the land as his own and exercised openly acts of ownership over it; that he rented a portion of the premises out, and received rents therefor, and that he still claimed the lands as his own. He further testified, that in the year 1876, he made the deed offered in ev-



[Williams v. Higgins.]

idence by the plaintiff, and carried it to Troy, and handed it to S. A. Williams folded up, and told him, there was a paper which he wanted him to place in his safe and keep it until he, defendant, should call for it, but that the paper was not for record. He further testified, that neither S. A. Williams nor D. Williams knew that he was going to make the deed; that he had no conversation with either of them in regard to it, and that neither of them knew the contents of the paper, when it was handed to S. A. Williams to put in his safe. That there was no consideration for the said deed, and that neither S. A. Williams nor D. Williams had ever paid or promised him any thing for said deed, or the lands thereby conveyed, and that they had no contract or agreement about it whatever. He further testified, that at the time he made the deed, one of his creditors was pressing him and he made the deed to his brothers, S. A. & D. Williams, in order that they could claim the land, if it became necessary to keep his creditors from oppressing him; that a few days after he had placed the deed in the hands of his brother for safe-keeping, he had a conversation with S. A. Williams and told him of the object of the deed, and requested him and D. Williams to hold it until witness called for it, and that he expected his brothers to claim the land, if it became necessary to keep his creditors from oppressing him, and such was his intention in making said deed and delivering it to S. A. Williams; that to this his brother assented; and that he only had, including the lands sued for, one hundred and sixty acres. He further testified, that neither S. A. Williams, nor D. Williams ever laid any claim to the land described in the deed; that he never paid them any rent, nor did they in any manner interfere with his possession, and that they both knew that he was claiming the land openly and notoriously as his own, exercising acts of ownership over the lands; and that he had made valuable improvements on the same."

Thomas H. Beauchamp was also examined as a witness on behalf of the defendant, who testified, that he was the book-keeper of S. A. & D. Williams, and that "he found the deed in their safe and without any instructions from any one, he took the deed to the office of the judge of probate and had it recorded, and that he was afterwards notified that the paper was not intended for record by his employers." The defendant's testimony was also corroborated by S. A. Williams and D. Williams, who were also examined as witnesses in his behalf.

This being all the evidence the defendant asked the court in writing to give the following, among other charges, to-wit: (1). "If the jury believe the evidence, they must find for the defendant." (2). "If the jury believe from the evidence, that the deed in evidence from the defendant to S. A. & D. Williams

[Williams v. Higgins.]

is without consideration, they must find for the defendant. (3). "If the jury believe from the evidence, that after the defendant and his wife had signed the deed in evidence, the defendant handed the same to S. A. Williams and told him to take and put it in his safe and keep it until he called for it, and that it was not a paper for record, that was not such delivery as the law recognizes as sufficient to pass the title, and they must find for the defendant." (4). "If the jury believe from the evidence, that the deed in evidence was made by the defendant with the intent to keep his creditors from selling it, and S. A. & D. Williams, or either of them, accepted the deed with a knowledge of such intent, or they, or either of them, were subsequently informed of such intent, and still held and retained the deed, and they should further believe from the evidence, that the defendant continued in possession of the lands, and is still in possession of the same, they must find for the defendant." (5). "If the jury believe from the evidence, that the defendant was in possession of the land sued for, claiming it as his own, at the time S. A. & D. Williams made their assignment to Beauchamp, and at the time the plaintiff was substituted in his stead, then they must find for the defendant." (6). "If the jury believe from the evidence, that the deed in evidence was made and executed by the defendant to hinder and delay his creditors in the collection of their debt, and that S. A. & D. Williams, or either of them, were informed of such intent, and retained the deed afterwards, that was a participation in such fraudulent intent, and they could not recover the lands of the grantor, if he was in possession. The law, in such cases, leaves the parties where it finds them; and if the jury further believe from the evidence, that the plaintiff is the assignee of S. A. & D. Williams, they must find for the defendant." (7). "If the jury believe from the evidence, that the deed made to S. A. & D. Williams was without consideration, and that the defendant continued to live on the lands exercising acts of ownership, and asserting, openly and notoriously, ownership in himself, and that he made valuable improvements on the premises, rented the lands out and received the rents as his own, then the defendant held the lands adversely; and if they further believe from the evidence, that whilst the defendant was thus in possession, S. A. & D. Williams made a general assignment of their property, and conveyed the lands in controversy to their assignee, that assignment does not confer such title upon the plaintiff as will entitle him to recover in this action, and they must find for the defendant." The court refused these charges, and the defendant separately excepted.

The plaintiff obtained a verdict, on which a judgment was rendered in his favor for the lands sued for, and from that judg-

[Williams v. Higgins.]

ment this appeal was taken. The rulings of the Circuit Court on the charges asked by the defendant, are here assigned as error.

GRIFFIN & WOOD, for appellant.—(1). There was no such delivery of the deed from the defendant to S. A. & D. Williams, as passed the title.—Greenleaf's Cruise on Real Property, Title 32, Deed, Chap. 2, §§ 62 and 64, and note to last section; Wait's Actions and Defenses, Vol. 2 (5th Ed.), § 297; *Fuller v. Hollis*, 57 Ala. 435. (2). If there was any delivery of the deed, it was contingent upon the necessity of defendant claiming the lands as against his creditors, and the record fails to show that any such contingency ever happened. (3). The general assignment having been made to pay pre-existing debts, and the defendant having continued in the actual possession, claiming the land as his own, the plaintiff can not claim to be a *bona fide* purchaser for value, and without notice of defendant's rights to the land. He, therefore, has no better claim than S. A. & D. Williams had.—*Burns v. Taylor*, 23 Ala., 255; *Pylant v. Reeves*, 53 Ala. 132. (4). If there was a delivery, the deed was made and accepted for an *unlawful purpose, against the policy of the law*, and in violation of a highly criminal statute.—Code of 1876, § 4352. It follows that the maxim, *Ex turpi contractu actio non oritur*, applies.—*Clark v. Colbert*, at Dec Term, 1881; Greenleaf's Cruise on Real Property, Title 32, Deed, Chap. 2, § 43. (5). While the deed, when delivered, carried with it constructive possession, the defendant has always had the actual possession. Both parties are equal in guilt, and the plaintiff can not get the aid of the law to obtain possession. *In pari delicto melior est conditio possedentis*.—*Clark v. Colbert*, *supra*; *Kennett v. Chambers*, 14 How. 38; *Mitchell v. Smith*, 2 Amer. Dec. 417; *Seidenbender v. Charles*, 8 Amer. Dec. 682; *Wilson v. Spencer*, 10 Amer. Dec. 491; *Gray v. Roberts*, 12 Amer. Dec. 383. (6). The defendant held the lands adversely.—*Ladd v. Dubroca*, 61 Ala. 25. This being true, the right acquired by plaintiff was merely a *right to recover the land by suit*. This right S. A. & D. Williams could not grant.—*Pryor v. Butler*, 9 Ala. 418. The court, therefore, ought to have given the general charge in favor of defendant. *Bernstein v. Humes*, 60 Ala. 600; *Ladd v. Dubroca*, 61 Ala. 25; *Pryor v. Butler*, 9 Ala. 418; *Clay v. Wyatt*, 6 J. J. Marsh. 583; White & Tudor's Leading Cases, (4th Amer. Ed.) Vol. 2, Part 2, p. 1631.

JNO. D. GARDNER, *contra*.—(1). A fraudulent grantee may bring ejectment.—Bump on Fraud. Con. p. 456 and authorities cited. (2). A deed of land held adversely to the grantor



[Williams v. Higgins.]

is good between the parties, upon the principle of estoppel, which operates upon the parties and their privies.—*Harvey v. Carlisle*, 23 Ala. 635. A court of justice will not give its sanction to a possession, which is held under a fraudulent arrangement. (3). To say that the deed was not delivered in this case, would be to say that a fraudulent deed is incapable of being delivered to a grantor who participates in the fraudulent design.—*Patton v. Beecher*, 62 Ala. 580.

BRICKELL, C. J.—1. When a deed is found in the possession of a grantee, the presumption arises that it was duly delivered to him. The presumption is disputable, and it may be countervailed by evidence, that he obtained the possession without the knowledge or consent of the grantor, surreptitiously, or illegally, the burden of proof resting on the party disputing the presumption. But when the possession is obtained from, and by the act of the grantor, or with his consent, without infringing salutary principles of the law of evidence, it is not permissible for him to show that the delivery was not absolute; that it was conditional or qualified. The deed of the appellant on its face is an absolute bargain and sale of the lands, with full covenants of warranty, purporting to be signed, sealed and delivered in the presence of subscribing witnesses. Voluntarily, by his own act, the grantor placed it in the possession and under the dominion of the grantees. The law declares its operation and effect, which can not be avoided by parol evidence showing the delivery was not absolute, that it was qualified, or conditional, without a violation of the cardinal rule, that the operation and effect of written instruments can not be varied or altered by evidence resting in parol.—*Ward v. Lewis*, 4 Pick. 518; *Lawton v. Sager*, 11 Barb. 349; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147–160. It is as incumbent on a grantor who would qualify the delivery of a deed to the grantee, to express the qualification in the deed, or in an accompanying writing, as it is to express in writing any qualification or limitation of the words of grant or covenant found in the deed. In legal contemplation, all parol negotiations or agreements, whatever they may have been, antecedent or cotemporaneous, existing at the time of the delivery of the deed, are merged in the delivery, and from that time it is an operative conveyance according to its terms. The delivery of course includes acceptance by the grantees, and neither party can be allowed by parol to qualify the legal effect of his own voluntary and intentional act. There was no error in the ruling of the Circuit Court in reference to the delivery of the deed made by the appellant conveying the lands in controversy to S. A. & D. Williams.

2. The deed purports to be founded on a pecuniary consid-  
VOL. LXIX.

[Williams v. Higgins.]

eration, and in the absence of fraud in its execution, it is not permissible for the grantor in a court of law to show the want, or inadequacy of the consideration expressed.—*Morris v. Harvey*, 4 Ala. 300.

3. Conveyances, or gifts, made to hinder, delay, or defraud creditors, are valid and operative between the parties, when fully consummated; neither party can rescind or defeat them. 2 Brick. Dig. 16, § 45. And it is not material whether the party is alleging the fraud as matter of defense, or as a ground of action, for, as was said by Lord MANSFIELD, 1 W. Black. 364, “no man shall set up his own iniquity as a *defense*, any more than as a cause of action.” The plaintiff in the present action showed a legal title to the lands in controversy, entitling him to recover possession, by the exhibition of the paper titles, the first of which was the deed made by the appellant, and all fair on their face, not importing that any one of them was founded upon or connected with an illegal or immoral transaction. The defendant, to avoid his own conveyance, avers his fraud, his illegal and immoral conduct and purposes. He in fact becomes the actor, and seeks the assistance of the court to relieve him from the toils of his own invention. No court has as yet given such assistance. Truth and fair dealing are rules of universal obligation. If men in consummation of frauds, employ instruments, binding and conclusive in their legal operation and effect, it is sound reason, good policy, sheer justice, to leave them where they have placed themselves, bound as they have bound themselves, without assistance from the courts to unloose them, when it becomes their interest to be unloosed, encouraging them and others to commit similar frauds.

4. No question of adverse possession arises on the facts in the record. The grantor, it is true, remained in the actual and continuous possession of the lands, taking the rents and profits. But the possession was not hostile to the title of the grantees, or so intended. On the contrary, it was intended to be in subordination to their title, if the creditors of the grantor sought to reach and subject the lands. Hostility to the title of the true owner is an essential element of adverse possession, and a possession can not be adverse, which in any contingency is intended to be in subservience and subordination to the true title.

We find no error in the record, and the judgment is affirmed.

[Smith v. Sweeney.]

**Smith v. Sweeney.***Detinue for Recovery of a Horse.*

1. *General exception to charge ; what is, and its effect.*—When the general charge of the court enunciates distinct propositions of law, which are separable, one from the other, and consists of several paragraphs, which are neither numbered nor otherwise marked, so as to designate the parts into which the charge is divided, an exception thereto in these words: "To which charge the defendant excepted, separately and severally, and as a whole," is only a general exception to the entire charge, and can not avail, on appeal, unless each part of the charge is erroneous.

2. *General exception to the refusal of several charges unavailable, when one is incorrect.*—Where several written charges were asked, some of which were given and the others refused, an exception to the rulings of the court thereon in these words: "Which charges were refused by the court, and to which refusal the defendant excepted," is only a general exception to "a mass of charges refused," and the party excepting can take nothing thereby, if any one of the charges asked asserts an incorrect legal proposition.

3. *Suggestio falsi ; when it will authorize rescission of contract.*—If in a negotiation for the purchase of a horse, or preparatory thereto, the party desiring to purchase recklessly, or without knowledge whether it was the truth or not, made a material statement *as fact*, which, if true, would be calculated to influence the conduct of the party selling, and did influence him in making the sale, then, if the statement turned out to be false in fact, this was such a fraud on the seller, as would authorize him to rescind the contract.

4. *Relation of trust and confidence ; when it exists, and its effect upon contracts made between parties sustaining such relation.*—Between the owner of a horse and a party who has undertaken to train it for a reward, there exists a relation of trust and confidence; and in addition to the duty of honest, faithful service, the law imposes upon the latter the duty of truthful and faithful report of all within his knowledge affecting the value of the horse; and a purchase of the horse by such party, in person, or through another, without having first made a full and candid disclosure of all that had come to his knowledge, affecting the value and speed of the horse, is a fraud upon the seller, which will authorize him to rescind the contract of sale.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

This suit was brought by Edgar J. Sweeney against Williard B. Smith, to recover a horse. On the trial the evidence disclosed, that the horse in question was purchased by the plaintiff on account of his pedigree; that the plaintiff placed the horse with the defendant, who was a livery stable keeper, and experienced in training trotting horses, to keep and train for him as a trotter, for which he agreed to pay defendant at the rate of



[Smith v. Sweeney.]

\$30 per month; and that he never drove the horse after he had placed it with defendant, and only saw it in harness once or twice. The evidence also tended to show that the defendant kept the horse about two months for plaintiff, and that during that time the defendant always spoke disparagingly of the horse, stating to plaintiff, that it had neither speed nor gait, and never would make a trotter, and was only fit for a saddle horse; that the plaintiff became discouraged about the horse on account of these representations, and finally sold it to one Hammond, who approached him on the streets with a proposition to buy, for an amount much less than the horse's true value; that afterwards plaintiff discovered facts tending to show that the representations made by defendant touching the horse were untrue; that Hammond had purchased the horse for defendant, and with defendant's money, and that the horse had never left defendant's possession; that thereupon the plaintiff tendered to defendant the amount he had received for the horse, and demanded possession thereof, which was refused.

The assignments of error are based on the charge given by the court and upon the refusal of the court to give certain charges asked by the defendant. These are sufficiently stated in the opinion.

J. LITTLE SMITH, for appellant. (No brief came to the hands of the reporter.)

BOYLES, FAITH & CLOUD, *contra*. (1). The exception to the general charge of the court does not point out the particular matter deemed obnoxious by appellant. It is a general exception to the entire charge. The exception will, therefore, avail the appellant nothing, unless the whole charge is incorrect.—59 Ala. p. 272; *Ib.* p. 570; *Ib.* p. 625; 58 Ala. p. 339; 53 Ala. p. 87. (2). The exception to the refusal of the court to give the several charges asked by the appellant, is to the ruling of the court on all these charges, and not to the separate ruling on each of them.—*Eagle & Phoenix Man'g Co. v Gibson*, 62 Ala. p. 369. In such case, this court will not sift these charges to find out some error inadvertently committed by the court in its rulings, but will consider them as an entirety, and not each of them separately.—Authorities *supra*. (3). "An agent, if he purchases property of his principal, must communicate fully and truly every fact in relation to such property within his knowledge; and he must also be known as the purchaser, for if he acts secretly, the contract will certainly be held to be fraudulent."—1 Perry on Trusts, p. 246, § 206; 4 Wait's Ac. & Def. p. 446; 4 U. S. Dig. p. 319, § 5; 1 Mason, 341; 49 Ill. 17; 43 *Ib.* 126; 47 *Ib.* 114; 1 Gilm. 626; 21 N. Y. 238;

[Smith v. Sweeney.]

31 Ala. 428; 11 Ala. 345; 5 Ala. 596; 28 Ohio St. p. 10. (4). "Fraud will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void."—14 Peters, p. 594; 1 Cranch C. C. 585; 9 Port. 174; 5 Ala. 199; 7 Ala. 269; 2 Brick. Dig. p. 14. (5). Smith can not take advantage of his own wrong and claim any benefit therefrom.—7 Ala. p. 269; 11 Ala. p. 345; 2 Ala. p. 749. (6). Sweeney had the right to avoid the contract of sale.—30 Penn. St. 478; 79 Ill. 92; 62 *Ib.* 83; 4 S. & R. 487; 21 Vt. (6 Wash.) 129; 11 Ala. 531; 1 Brick. Dig. p. 59, § 98; 6 Nevada, 183; 3 Wait's Ac. & Def. p. 429; Benj. on Sales, 313-14; 42 Ala. 171.

STONE, J.—The general charge to the jury, given by the presiding judge in the court below, was in writing. It covers more than six pages of the folio transcript, and is made up of several paragraphs, but the paragraphs are not numbered, or otherwise designated, so as to show the parts, or any parts, into which the charge is divided. The only exception to this charge is in the following language: "To which charge the defendant excepted separately and severally and as a whole." Under the uniform rulings of this court, this can only be treated as a general exception to the entire charge as given. When a charge is divisible into separable or distinct propositions, the exception must point out the portion or portions of the charge objected to, that the presiding judge, having his attention directed to the subject, may recall or modify his own rulings; or, opposing counsel may have the opportunity of having that part of the charge withdrawn. If the exception fail to specify the part or parts objected to, then the exceptor takes upon himself the burden of showing the whole charge incorrect; and failing in any respect, his exception avails him nothing—*Chapman v. Holding*, 60 Ala. 522; *Holland v. Barnes*, 53 Ala. 83; *Owens v. The State*, 52 Ala. 400; *Bernstien v. Humes*, 60 Ala. 582; *Hardin v. The State*, 63 Ala. 39; *Gray v. The State*, 63 Ala. 66; *Mayor v. Rumsey*, 63 Ala. 352; *S. & N. R. R. Co. v. Sullivan*, 59 Ala. 272; *Mayberry v. Leech*, 58 Ala. 339. This last case is almost precisely like the one under consideration, and is decisive of the question we have been considering.

Defendant asked sixteen written charges, eleven of which were refused. The following is the only exception to the ruling on the charges requested: "Which charges were refused by the court, and to which refusal the defendant excepted." This being a general exception to a mass of charges refused, it follows, under the authorities cited above, that if any one of the charges asked assert an incorrect legal proposition, the appellant can take nothing by his exception, although every other

[Smith v. Sweeney.]

charge asked may assert a legal truism.—*Mayberry v. Leech*, *supra*; *Beaver v. Hardie*, 59 Ala. 510; *McGehee v. The State*, 52 Ala. 224.

Applying these principles, it is manifest, that much of the general charge is free from error. Few of its utterances are assailed in argument, and we apprehend counsel of appellant would admit that, in the main, it correctly declared the law.

In the ninth charge asked is the following language: "In order to set aside the sale, the representations of Smith must have been false at the time they were made, and Smith must have known them to be false." If there had been no relation of trust and confidence between Sweeney and Smith, this is not the rule for testing the *suggestio falsi*, as laid down in this court. If in the negotiation, or preparatory to it, Smith recklessly, or without knowing whether it was the truth or not, made a material statement *as fact*, which if true, would be calculated to influence the conduct of Sweeney, and did influence him in making the sale, then, if the statement turned out to be false in fact, this was such a fraud on Sweeney, as would authorize him to rescind the contract.—*Munroe v. Pritchett*, 16 Ala. 785; *Atwood v. Wright*, 29 Ala. 346; *Foster v. Gressett*, *Ib.* 393.

But this case is much stronger. If the testimony be believed, there was a relation of trust and confidence between Smith and Sweeney. The conscience of the former was charged with honest, faithful service to the latter, and of truthful, faithful report of all within his knowledge, affecting the value of the horse, which he had undertaken to train for a reward. The fact that Smith employed an unsuspected third person to effect the trade for him, is itself a suspicious circumstance against him, and does not in the least relieve him of the duty of fully informing Sweeney of the progress, performance and capabilities of the horse he had in training. Unless, before purchasing, he made a full and candid disclosure of all that had come to his knowledge, affecting the value and speed of the horse, he committed a fraud on his employer, and the law will not uphold him in such ill-gotten gains.—*Thompson v. Lee*, 31 Ala. 292; *Huguenin v. Baseley*, 14 Ves. 273; 1 Sto. Eq. Jur. §§ 315, 316, 316a; and authorities on brief of counsel in this case. The presiding judge submitted this question to the jury quite as fairly as the defendant could claim, and the jury, by their verdict, have convicted him of the fraud charged. Charge 9 should not have been given.—*Ferguson v. Lowery*, 54 Ala. 510.

We have singled out this charge for comment, not because we think it alone is erroneous. We thought it more clearly and patently faulty, and have therefore confined our remarks



[Ex Parte Smith.]

to it. We are not convinced the Circuit Court, in any of its rulings, erred to the prejudice of appellant; but we consider it unnecessary to decide or discuss other questions.

Affirmed.

## *Ex Parte Smith.*

### *Application for Mandamus.*

1. *Petition for mandamus; when it will not be considered by this court.* This court will not consider a petition for *mandamus*, to compel a probate judge to hear and determine evidence on a writ of *habeas corpus* seeking to review the petitioner's commitment by a justice of the peace on a charge of felony, where the record consists of a petition simply narrative of the facts, and averring that the probate judge declined to take jurisdiction, and dismissed the petition and writ of *habeas corpus*, there being no bill of exceptions, or entry of record showing the action of the court.

2. *Same; proper practice on application for in this court.* The proper practice in such cases is for the petitioner to reserve a bill of exceptions; and in the absence thereof, the case is not properly presented for the consideration of this court.

Application to this court for a writ of *mandamus*.

The facts are stated in the opinion.

W. W. WHITESIDE, for petitioner.

SOMERVILLE, J.—This is an application on the part of the petitioner, Smith, for a writ of *mandamus*, to compel the probate judge of Calhoun county to hear and determine evidence on writ of *habeas corpus*, seeking to review the petitioner's commitment by a justice of the peace on a charge of assault with intent to murder.

The record before us consists of a petition simply narrative of the facts, accompanied with the averment that the probate judge declined jurisdiction and dismissed the petition and writ of *habeas corpus*. The facts are admitted by the probate judge to be stated correctly in the petition—this admission being in writing. There is no bill of exceptions reserved, and no record showing the action of the court other than the averments of the petition.

The proper practice in cases of this character is for the petitioner to reserve a bill of exceptions, and in the absence of it, the case is not presented properly for the consideration of this

[Hooper v. Savannah & Memphis R. R. Co.]

court.—*Ex parte South & North R. R. Co.*, 65 Ala. 599; *Ex parte Dickson*, 64 Ala. 188; *Ex parte Brown*, 65 Ala. 446; *Ex parte Nettles*, 58 Ala. 268; *Ex parte Croom & May*, 19 Ala. 561.

The application is denied with costs.

## Hooper v. Savannah & Memphis Railroad Company.

*Bill in Equity against Railroad Company to Enforce Vendor's Lien on Right of Way.*

1. *Motion to dismiss bill for want of equity; when should be overruled.* Under the rules of practice governing courts of chancery in this State, a motion to dismiss a bill for want of equity should only prevail when, admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relief. If it is apparent, upon a proper statement of the facts, and appropriate prayer, equitable relief may be obtained, the motion should be overruled, and the respondent put to his demurrer, or leave should be granted to the complainant to amend, so as to obviate the defects in the bill.

2. *Private property condemned for public uses; what is just compensation.* Just compensation, under the constitution, to the owner of a city lot, for a part of the lot taken and applied to the use of a railroad company, includes not only the value of the part of the lot so taken and applied, but also the injury resulting therefrom to the remaining parts of the lot; and if the ways of access to, and egress from, the lot are obstructed or interrupted thereby, such obstruction or interruption forms a part of the injury, for which the owner is entitled to compensation.

3. *When a fixed sum to be paid on breach of contract, a penalty and not liquidated damages.*—Where a railroad company, having constructed its road-bed through a city lot, instead of proceeding under the statute, entered into a written contract with the owner, thereby acquiring a right of way over the lot, in consideration of a given amount in money, and of an agreement on its part, that it would do certain work on specified streets leading to, or around the lot, where they were intersected by the railroad, within a time prescribed by the contract,—a stipulation in such contract, that for any failure on the part of the company, after the time within which it agreed to do the work, it would pay the owner one dollar per day for each day it was in default, will be construed to have been intended by the parties as a penalty, and not as liquidated damages; and on a breach of the stipulation the owner would be entitled to recover the actual loss or injury sustained by him therefrom, which is the diminution of the value of the lot resulting from the obstruction or interruption by the railroad of the streets on which the work was to be done.

4. *Damages for breach of contract; when a court of equity will decree.* As a general proposition, courts of equity will not entertain suits, the sole object of which is compensation for breaches of contract; but when the court has acquired jurisdiction, as incidental to other relief, or if a peculiar equity intervenes, such compensation may be decreed.

5. *Relation of vendor and vendee; special contract construed as cre-*

[Hooper v. Savannah &amp; Memphis R. R. Co.]

*ating; specific performance of contract.*—Where a railroad company, having constructed its road-bed through a city lot, without having first made just compensation therefor, entered into a written contract with the owner, by which the company stipulated to pay him a stated amount in cash, and further, to do and perform certain work on specified streets contiguous to the lot and necessary to access to, and egress from it, where they were intersected by the railroad, within a given time, and under a prescribed penalty; and in return the owner was to give the company the right to run their road through the lot on the bed as graded, with a right of way to the extent of twenty-five feet from the center of the road-bed, and also the right of the use of another designated part of the lot, the owner retaining the legal title; and the company, having made the cash payment, failed to do the stipulated work on the streets,—*held*,

(a). That the contract being construed in view of the relation of the parties and of their rights and liabilities—a land-owner whose property was liable to be taken for public uses, and a corporation having authority to take and acquire it for such uses—the payment to the owner of the compensation he was entitled to receive, partly in money, and partly by the performance of the stipulated work on the streets, where intersected by the railroad, obstructing access to the lot and impairing its value, was the purpose intended to be accomplished by the parties.

(b). That, under the contract, the relation of the parties is that of vendor and vendee, the vendor having a lien on the rights in the lot acquired by the vendee, for the unpaid balance of the consideration therefor, which is the diminished value of the lot caused by the obstruction or interruption of access to it by the railroad intersecting the streets; and that a court of equity has jurisdiction to enforce this lien.

(c). That a court of equity also has jurisdiction to enforce the specific performance of the contract, and, as incidental thereto, to decree compensation for any damages suffered by the owner from the failure of the company to do the work stipulated.

(d). That the legal title not having passed by the contract, but having been retained by the vendor, the company's title was, at most, merely equitable; and a mortgagee of the company, being chargeable with notice of the nature and character of the right, title and possession of the company, can not be regarded as a *bona fide* purchaser for a valuable consideration, without notice; but he only succeeds to the equitable right or title of the company and takes it *cum onere*.

#### APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on the 7th of April, 1880, by George W. and George D. Hooper, against the Savannah and Memphis Railroad Company, a corporation owning and operating a railroad in this State, and others claiming under a mortgage executed by the company “a few days before the date” of the agreement, upon which this suit is founded. The case made by the record is substantially stated in the opinion. It will not, however, be amiss to set out, in the language of the agreement, the work which the railroad company agreed to do and perform on certain streets therein mentioned, as it is upon the failure of the company to do and perform that work, this suit is founded. The language is as follows: “The said railroad company to fill, level or grade every street which leads to or around Block A, where George D. Hooper resides, which is cut by said railroad,



[Hooper v. Savannah & Memphis R. R. Co.]

in such a manner, and to such an extent, as to make the crossing of said railroad by each of said streets as ample and as convenient, as it is possible to make them consistently with the running and use of said railroad, and this grading, filling up and leveling to extend to the width of twenty feet, and to be always kept up by said company; provided, however, that a bridge, if deemed advisable by both parties, may be built by the company across the railroad on Washington street."

SAM'L F. RICE, and G. D. & G. W. HOOPER, for appellants. (1). The amount agreed by the railroad company to be paid per day on its default to do the stipulated work, was not unreasonable, and it is the measure of damages.—Abbott on Shipping, title Demurrage, p. 383, and cases cited; *Pettis v. Bloomer*, 21 How. Pr. Rep. 317. (2). It is obvious from the contract, that the agreement to either grade the streets and make crossings, or in lieu thereof, to pay one dollar per day, was a part of the consideration given for the land, for the enforcement of which the appellants had a vendor's lien.—*Walker v. W. H. & B. R. Co.*, 1 Eq. Cases, p. 195; *Cosens v. Bognor Railw. Co.*, 1 Ch. Ap. Cases, 594; *Walker v. E. C. R. Co.*, 12 Jurist, Pt. 1, 787; *Earl St. Germans v. C. P. R. Co.*, 11 Eq. Cases, 568; *Bishop of Winchester v. M. R. R. Co.*, 5 Eq. Cases, 17; *Munns v. Isle of Wight R. R. Co.*, 8 Eq. Cases, 653; S. C., 5 Ch. Ap. Cases, 414; 2 Story's Eq. Jur. (12 Ed.) §§ 1231, 1566-7; Redfield on Law of Railroads, 257; *Phillips v. Thompson*, 1 Johns. Ch. 131. (3). A court of equity has jurisdiction to enforce specific performance of the contract.—*Lytton v. G. N. R. Co.*, 2 Kay & J. 394; 2 Story Eq. Jur. § 1567; *Sanderson v. C. & W. R. Co.*, 11 Beavan, 497. (4). A vendor's lien can not be considered a stale demand, if bill to enforce it is filed within twenty years. *Relfe, v. Relfe*, 34 Ala. 500. (5). If the bill was susceptible of amendment, it should not have been dismissed in vacation. *Bishop v. Wood*, 59 Ala. 253.

W. H. BARNES, *contra*.—The bill is filed to attempt to enforce an alleged lien for breach of covenants on the part of the company, as shown in the agreement set forth in the bill. This can not be done.—*McCandlish v. Keen*, 13 Grat. 615; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 528; *McKillop v. McKillop*, 8 Bar. 552; *James v. Bird*, 8 Leigh, p. 510.

BRICKELL, C. J.—The original bill filed by the appellants states, in substance, that they are, and were the owners of three parcels of lands situate in the city of Opelika, known and designated as lots 2, 3 and 4 in block A. These lots formed one

[Hooper v. Savannah &amp; Memphis R. R. Co.]

"compact settlement," on which was the residence of the appellant, George D. They are bounded by three of the streets of the city, known as Washington street, North Railroad street and Coosa street, and separated from Wilcox street by lot 1 of said block. On and before the 6th day of September, 1870, the Savannah & Memphis Railroad Company had constructed its road-bed through lot numbered 4, and through a small corner of lot 3. On that day the railroad company and the appellants entered into an agreement in writing, a copy of which is exhibited, by which the company stipulated to pay the appellants in cash three hundred and seventy-five dollars, and also stipulated to do certain work upon the streets aforesaid where they were intersected by its road. In return, the appellants were to give the company the right to run their road through said block on the bed as graded, and the use of all of lot 4 on the north side of the road, and the right of way to the extent of twenty-five feet from the centre of the road-bed. The company stipulated to do and perform all of the work on the streets on or before the first day of June, 1871. For any failure after that time, they stipulated to pay the appellants one dollar per day, for each day they were in default. Each party stipulated, on the request of the other, to execute any other or further deeds or instruments necessary to give effect to their intentions and purposes.

The company made payment of said sum of three hundred and seventy-five dollars, entered into possession of the parts of the lots on which the road-bed was constructed, and of the twenty-five feet from the centre of the bed, and of the part of lot number 4 north of the road, and have since had undisturbed occupancy. They have failed and neglected to do the work stipulated on Coosa street, or on North Railroad street, and in consequence said streets are useless as ways to and from lots 2 and 3, and the part of lot 4 reserved by the appellants. And they have also failed to provide, on Wilcox street, the crossing agreed to be provided. They have failed and neglected to pay or tender to the appellants "the amount stipulated in said agreement as liquidated damages for its default in relation to the crossings or any part thereof, or any compensation in any shape whatever."

It is alleged the agreement of the company to do the stipulated work on the said streets, or failing therein, to pay certain damages, was a part of the consideration of the purchase of the right to, and use of the lands of which it has possession under said agreement. The insolvency of the company is averred, and its execution of a mortgage conveying all its property, for the foreclosure of which proceedings were pending in the Court of Chancery.

The prayer of the bill is, that a decree be rendered for the payment to the appellants of the sum of one dollar per day for

[Hooper v. Savannah & Memphis R. R. Co.]

the period the company has been in default in the performance of the said work; that a lien for the payment thereof be decreed on the lands it acquired under said agreement; and that the company and its assignees be compelled to do and maintain said work, and the agreement declared a perpetual lien for compelling them to do and maintain the same, and for general relief.

The hearing in the Court of Chancery was had on motion to dismiss the bill for want of equity, no demurrer or answer having been filed. The chancellor was of opinion, that the bill could not be regarded as the bill of a vendor claiming a lien for the purchase-money; that it was a bill for the recovery of stipulated damages, stating no fact rendering necessary the interference of a court of equity, and could not be entertained. Therefore, the motion was sustained and the bill dismissed.

It is not an uncommon error to suppose that, under the principles and rules governing our courts of chancery, a motion to dismiss a bill for want of equity, and a demurrer are equivalents—that any and every objection which would be available on demurrer, is equally available as the ground of a motion to dismiss. The motion to dismiss has its authority in the 76th Rule of Chancery Practice, which reads: “A defendant may, at any stage of the cause, move to dismiss a bill for want of equity, unless a similar motion has been previously made and determined. If the cause is ready for hearing on bill and answer, or pleadings and proof, such motion may be made and heard in connection with the final hearing.” Like the general demurrer which was usual in our practice prior to the Code, a motion to dismiss a bill for want of equity directs attention wholly and exclusively to the equities of the bill, not to its frame, or the want or misjoinder of parties, or other matter, which, if a demurrer were interposed, would be regarded as waived, if not specially assigned. The present bill may be open to criticism, there may be defects in its frame, and omissions of proper averments adapting it to the particular relief to which the complainants may be entitled. These defects, if made the cause of demurrer, are curable by amendment, but do not form proper matter of a motion to dismiss for want of equity. That motion should prevail only, when admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relief whatever. If it is apparent, upon a proper statement of the facts and an appropriate prayer, equitable relief may be obtained, the motion should be overruled, the respondent put to his demurrer, or leave granted the complainant to amend, obviating the defects in the bill. Such is the course of practice in Tennessee under a statute similar in terms to our



[Hooper v. Savannah & Memphis R. R. Co.]

rule of practice.—*Thompson v. Paul*, 8 Humph. 114; *Quinn v. Leake*, 1 Tenn. Ch. 67; *Randall v. Payne*, *Id.* 137.

The important, controlling question is, whether, under the facts stated in the bill, a case of equitable cognizance can be presented, when these facts are properly pleaded. The just construction of the contract into which the parties entered, their objects and purposes, must be ascertained. In ascertaining the construction, regard must be had to the legal relation and condition of the parties, and their rights and liabilities when they entered into the contract. The appellants were the owners of a parcel of land, which, though designated as separate or distinct lots in the plan of the city, and by the designation were capable of distinct conveyance, and of separate ownership, yet in fact adjoined, and were used and occupied as an entirety; as forming and constituting, in the language of the bill, *one compact settlement*, the residence of one of the appellants. The taking of a part of the lots for the uses of the railroad, was the taking of private property for public uses, and, under the constitution, in the absence of a contract or agreement with the owner, could be legalized only by the payment to them of just compensation at the time of the taking. Just compensation included not only the value of the parts of the lots actually taken and appropriated to the use of the company, but the injury to the remaining lots or parts of lots, and if the ways of ingress to, and egress from the lots were obstructed or interrupted, such obstruction or interruption formed a part of the injury, for which compensation should have been made. The general rule of damages in such cases is the fair market value of the land actually taken, and the diminution in the market value of the land not taken, because of the uses to which the part taken is appropriated. In other words, the difference between the market value of the whole lots as they were at the time of the taking, and the market value of the lots and parts of lots remaining to the appellants after such taking, was the measure of just compensation to which they were entitled.—*Pierce on Railroads*, 210; *Cooley Con. Lim.* 708, (4th Ed.) It is apparent that the contract was entered into in view of the relation of the parties, and of their rights and liabilities in that relation—a land-owner whose property was to be taken for public use, and a corporation having authority for such uses to take and acquire it. The payment to the appellants of the compensation they were entitled to receive, partly in money, and partly by the performance and maintenance of the work on the streets, where intersected by the railroad, obstructing access to the lots, impairing their value, was the purpose the parties had in view. Time was given the company, a period of nearly nine months, for the performance of the work, and in the event it was in de-

VOL. LXIX.

[Hooper v. Savannah & Memphis R. R. Co.]

fault at the expiration of the period, it stipulated to pay the appellants one dollar for each day the default continued.

It is certainly competent for parties entering into a contract, to avoid all future contention as to the amount of damages which may result from its breach, to agree and fix upon a certain, definite sum, as that which shall be paid to the party injured by the party in default in performance of the contract. Damages so ascertained are termed indifferently *liquidated*, or *stated*, or *stipulated* damages. Though the parties may agree, and may express precisely their agreement, declaring the sum to be paid in event the contract is broken, and denominate it as *fixed*, or *stated*, or *liquidated* damages, a perplexing question often arises, whether the intention was to afford fair and reasonable compensation for the injury resulting from the breach, simply and merely, or whether, by way of quickening diligence in punctual performance, a penalty or a forfeiture was intended, which must be suffered without regard to the actual injury resulting from the failure to keep the contract. In the determination of this question, as in the determination of all other questions touching the construction of contracts, the governing guides are the subject of the contract, and the intention of the parties. Considering this particular question, said Chief Justice COLLIER, in *Watts v. Sheppard*, 2 Ala. 434, "the first general principle in the construction of all contracts is, that they shall be so expounded, as to carry into effect the intention of the parties. To this end, the court should, if necessary, look to the subject-matter of the contract, the situation of the parties, the motives that led to it, and the objects intended to be attained by it." Among principles well established in determining whether a stipulation or covenant of the character now under consideration is in its nature a penalty or liquidated damages, the first is, that it is the tendency and preference of the law, to regard the stipulation or covenant as of the nature of a penalty, rather than as liquidated damages, because then it may be apportioned to the loss actually sustained; and compensation for that loss is the full measure of justice and right.—*Shute v. Taylor*, 5 Metc. 61; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 Allen, 19; *Bagley v. Peddie*, 5 Sandf. (Sup. Ct.) 192; *Baird v. Tolliver*, 6 Humph. 186. And if it be doubtful, upon a just consideration of all the terms and purposes of the contract, of the relation of the parties, of their objects and purposes, and of the duty to be performed, whether the sum stated was intended as liquidated damages, or as a penalty, as the latter it will be construed. *Shaddock v. Marsh*, 1 Zab. (N. J. Law), 434; *Whitfield v. Levy*, 6 Vroom (N. J. Law), 149; *Taylor v. Sandiford*, 7 Wheat. 13; *Bagley v. Peddie*, *supra*. And where the agree-

[Hooper v. Savannah &amp; Memphis R. R. Co.]

ment or covenant is for the performance of several things, and the stipulation is for the payment of a sum in gross in the event of a failure to perform, in whole or in part, the sum stated will be considered as a penalty.—*Watts v. Sheppard*, 2 Ala. 425; *Bagley v. Peddie*, *supra*; *Shadduck v. Marsh*, *supra*; *Owens v. Hodges*, 1 McMullen (Law), 106; *Basye v. Ambrose*, 28 Mo. 39; *Curry v. Larer*, 7 Penn. St. 470.

This stipulation is for work to be done at the intersection by the railroad of four several streets, leading to or around the lots of appellants. The object in view was repairing the injury done to the lots by the obstruction or interruption of access to and from them, through and by these streets; in this respect, to place the lots as far as practicable in the condition they were when the railroad was constructed. It is scarcely possible that the work to be done on the crossings of each street, involved the same labor and expense, or that the injury resulting to the appellants from the obstruction or interruption of each crossing, was the same in degree; yet, the stipulation is for the payment of the same sum for each day's default in the performance of any part of the work, as for a default in entire performance. Any breach of the stipulation, great or small, without regard to the consequent injury to the appellants, makes a default for which the amount to be paid is precisely that which must be paid for an entire non-performance. This is manifestly unreasonable, and it is not improbable may be unconscionable to either party—in one event, exceeding the actual injury the appellants may sustain, and in another, not equaling, but falling below it. When the whole contract is considered, the relation of the parties, and the objects, it is apparent, they had in view, it seems plain enough that the parties could not have intended that the sum mentioned should be taken as liquidated damages. It is, to say the least, doubtful what was their intention, and there is less danger of oppression and injustice from regarding it as a penalty than from treating it as a covenant to pay liquidated damages.

The diminution of the value of the lots of the appellants because of the obstruction or interruption of the public ways or streets leading to them, is, as we have seen, an element of the just compensation which must be made to them, because of the taking and appropriation of parts of the lots to the uses of the railroad company. This diminution of value is the real loss sustained, the injury the stipulation of the contract was intended to repair, and for the loss and injury the appellants are entitled to a recovery. As a general proposition courts of equity do not entertain suits, the sole object of which is compensation for breaches of contracts, or the recovery of damages for wrongs cognizable at law, because in courts of law, for such



[Hooper v. Savannah & Memphis R. R. Co.]

grievances, there are plain, complete, and adequate remedies. But when the court has jurisdiction, as incidental to other relief, or if a peculiar equity intervenes, compensation or damages may be decreed.—2 Story's Eq. § 794. If the parties had not agreed—if the company had not entered upon and acquired possession of the lands taken, with the consent of the appellants, without the prepayment of the damages resulting from the obstruction of access to the lots, and all other damages forming the just compensation which must be made, before private property can be taken and appropriated to public uses, a court of equity would have intervened and restrained by injunction the entry upon and possession of the land by the company.—*Bonaparte v. Camden and Amboy R. R. Co.*, 1 Baldwin, 205; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken R. R. Co.*, 20 N. J. Eq. 61; *Stacy v. Vermont Central R. R. Co.*, 39 Vt. 14. Entering upon the lands, acquiring possession by contract with the appellants, the relation of the parties is that of seller and purchaser. If the company had stipulated to pay, and the appellants had agreed to accept a specific sum of money, as just compensation for the lands taken, that sum would, of necessity, have embraced all compensation the appellants could have claimed for the interruption or obstruction of the highways leading to and from these lots, or because of the diminished value of the lots from any cause, in the appropriation of parts of them to the uses of the company. That sum would have been as essentially the purchase-money of lands, or of a right and interest in and to lands, as when between natural persons there is a bargain and sale for a specified price. What difference is there in right and principle, when a specific sum is promised and paid as partial compensation, and there is a promise to repair an injury by work and labor, which lessened the value of the remaining lands of the owner, for which he is entitled to compensation? If the injury is not repaired, the owner suffers loss, and the company gets the land without making the compensation justly due, without paying the consideration upon which it was let into possession. The real foundation of the lien of a vendor for the purchase-money of lands, is that it is against good conscience for one man to get and keep the lands of another, without paying the consideration promised to be paid for them. For the performance of the contract by the company, in all its parts, it is evident the appellants relied, and the company intended they should rely, on the lands taken as a security. The retention of the legal title is very strong, if it is not conclusive evidence of this reliance. The terms of the contract are conclusive—it is only *in return* for the performance by the company of the contract, that the appellants promise to give the company “the right to run their road

[Hooper v. Savannah & Memphis R. R. Co.]

through said Block, on the road-bed, as at present graded, and to the use of all of lot number four, on the north side of said railroad tract, and the right of way on lot number four to the extent of twenty-five feet from the centre of said railroad tract." The vendor of lands who conveys the legal title, not taking some other security than the promise of the vendee to pay, retains a lien for the purchase-money, and the presumption that it is retained, must be repelled by clear and convincing evidence of an agreement or intention to the contrary. The vendor who retains the legal title, and stipulates to convey it only on full payment of the purchase-money, holds it as a security for the purchase-money, which is of equal dignity with a mortgage.

Courts of equity often intervene to compel railroad corporations to the specific performance of contracts they make with land-owners.—2 Story's Equity, § 1566. In *Cosens v. Bognor Railway Co.*, Law Rep., 1 Ch. App. 594 (cited, 1 Redf. on Railways, 5th Ed. 256), a court of equity enforced the payment of damages assessed to the land-owner against a railway company, entering and constructing its road without making payment of them, by injunction restraining the use of the land until payment was made. In *Walker v. Ware, Hadham & Buntingford R. R. Co.*, 1 Law Rep., Eq. Cases, 195, under an assessment of compensation, and by agreement with the land-owner, the railroad company entered into possession, promising payment of the compensation assessed, and to pay such damages as a particular individual should award the owner for the injury he sustained by reason of the severance of the lands, or because of injury to his remaining lands. The Master of the Rolls, Sir J. ROMILLY, held, that the land-owner had a lien not only for the purchase-money of the lands which had been assessed as compensation, but for the damages resulting from the severance of the lands, and the injury to his remaining lands; and that, although the road had been constructed and opened for public uses, the lien would be enforced by a sale of the land.

There are authorities in this country recognizing the existence of a lien akin to that of a vendor's lien, in favor of the land-owner letting a railroad company into possession, upon conditions it fails or refuses to perform. Many of them are collated and referred to in *Pierce on Railroads*, 169, n. 5. In *Dayton R. R. Co. v. Lewton*, 20 Ohio St. 401, the land-owner agreed "to release the right of way, and the right to enter upon and construct its railroad" through his lands. In consideration thereof the company agreed to pay a certain sum of money at a future day, and to construct certain road-crossings and cattle-guards. Without receiving a deed to the right of way or any conveyance of it, before paying the money, and before constructing the crossings or guards, the company entered into

[Sweeney v. Bixler.]

possession and constructed its road. The court were of opinion the land-owner was entitled, at his election, to a specific performance of the contract, or to enforce a lien upon the lands, not only for the unpaid purchase-money, but also for the damages resulting from the failure to construct the road-crossings and the cattle-guards.

The only claim of the railroad company to the lands taken from the appellants, and appropriated to its uses, is derived from the contract, into which the parties entered. That contract did not pass a legal title; on the contrary, the legal title was retained by the appellants as a security for the performance by the company of the stipulations it agreed to perform, as the consideration for the lands. Its title was, at most, merely equitable, and its mortgagees can not be regarded as *bona fide* purchasers for a valuable consideration, without notice. To the equitable right or title of the company these mortgagees succeeded, and they take it *cum onere*. They are chargeable with notice of the nature and character of the right and title and possession of the railroad company.—*Gillison v. S. & C. R. R. Co.*, 7 S. C. (Law); 173.

Whether the appellants shall proceed to enforce specific performance of the contract, claiming compensation for any damages suffered from the failure of the company to do the work stipulated; or shall seek to enforce a lien for the diminished value of the lots because of the obstruction or interruption of access to them, there must be an amendment of the bill. Whether the right to specific performance has been lost or not, by the delay in claiming it, is a question which must be left open for consideration, if the bill is so amended as to claim it. In the present aspect of the case, it is enough to say, the bill is not devoid of equity, though its gravamen may be defectively stated; and the motion to dismiss should not have been allowed.

The decree of the chancellor must be reversed, the motion to dismiss the bill for want of equity overruled, and the cause remanded.

## Sweeney v. Bixler.

### *Bill in Equity to foreclose Mortgage.*

1. *Mortgage; when mortgagee is a purchaser.*—It has long been settled, that a mortgagee is a purchaser, when, contemporaneously with the exe-



[Sweeney v. Bixler.]

cution of the mortgage, or with an agreement, afterwards performed, to execute the mortgage, he parted with any thing of value, surrendered an existing right, incurred a fixed liability, or submitted to loss or detriment.

2. *Same*.—When the mortgage is made to secure a pre-existing debt, if there be such a valid, binding contemporaneous agreement to extend the debt to a future definite time, as will disable the mortgagee to sue before that time, this is a new present consideration, of benefit to the mortgagor, and also of detriment to the mortgagee, which will constitute the latter a purchaser.

3. *Same; when a mortgagee is not a purchaser*.—If a mortgage is executed to secure a pre-existing debt, and no new contemporaneous consideration passes, either of benefit to the mortgagor, or of detriment to the mortgagee, then the mortgagee does not thereby become a purchaser.

4. *Same*.—A note payable one day after date, given for an ascertained balance on a settlement of pre-existing demands, and contemporaneously with the execution of a mortgage securing the same, must be construed merely as evidencing a present indebtedness. It can not be supposed that the parties thereby intended either a benefit to the promisor, or any detriment to the promisee. The mortgagee is not, therefore, a purchaser as against an older latent right of a third party to the property conveyed by the mortgage.

5. *Same; law day thereof does not affect maturity of note*.—A mere agreement contained in a mortgage, that it shall not be foreclosed until a certain day subsequent to the maturity of the debt secured thereby, does not suspend the right to collect the debt, there being no agreement for an extension thereof.

APPEAL from the Chancery Court of Mobile.  
Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed by the appellee against the appellant and one W. B. Smith, to foreclose a mortgage executed by Smith to appellee, conveying a horse therein described, to secure a debt evidenced by a note of even date with the mortgage, and payable one day after date. It is averred in the bill, that the appellant claimed the horse as his property, and had brought suit against Smith for the recovery thereof; and he was, therefore, made a party defendant to the bill. By an amendment to the bill, the consideration of the debt evidenced by the note and secured by the mortgage was set forth. The averments in reference thereto are stated in the opinion. The appellant answered the bill setting up his claim to the horse and alleging that Smith and one Hammond had obtained it from him by collusion and fraudulent representations, and that his right thereto was superior to any equity that the appellee had under the mortgage. The material facts disclosed by the evidence are stated in the opinion. Upon final hearing, had upon the pleadings and proof, the Chancery Court declared the appellee a *bona fide* purchaser for a present valuable consideration, and decreed a foreclosure of the mortgage. From that decree this appeal was taken, and it is here assigned as error.

BOYLES, FAITH & CLOUD, for appellant.—Conceding that the  
VOL. LXIX.

[Sweeney v. Bixler.]

mortgage was taken in good faith and without notice, Bixler was not a purchaser for value.—*Stevens v. Brennan*, 79 N. Y. 254; *Weaver v. Barden*, 49 N. Y. 286; *Demott v. Starkey*, 3 Barb. Ch. R. 403; *Padgett v. Lawrence*, 10 Paige, 170; *Buller v. Harrison*, Cowper, 565; 36 Texas, 511; *U. S. v. Hodge*, 6 How. 279; *Rucker v. Robinson*, 38 Mo. 154; *McCune v. Belt*, 38 Mo. 281; *Headlee v. Van Lear*, 43 Mo. 235; *Haden v. Brown*, 18 Ala. 641.

C. J. TORREY, *contra*.—Bixler was a *bona fide* purchaser for value.—55 Miss. 348; 63 Ala. 336; *Ib.* 571. Being a *bona fide* purchaser for value, he can hold the property covered by the mortgage against the first vendor.—*Allen, Bethune & Co. v. Maury & Co.*, 66 Ala. 10; *Leigh Bros. v. M. & O. R. R. Co.*, 58 Ala. 165; 21 Ind. 411; 13 Ill. 610.

STONE, J.—The trotting horse, the subject of the present suit, was originally the property of Sweeney, placed in the hands of Smith to be trained. Hammond, as the agent of Smith, and with his money, purchased the horse from Sweeney, and took a bill of sale in his own name, not disclosing the fact that he was purchasing for Smith. The horse was never in Hammond's possession, but remained with Smith, who asserted and exercised ownership over him. While matters stood in this condition, and no adversary claim was asserted to the horse, Smith executed a mortgage, conveying the horse to Bixler, as security for a debt. The present bill was filed to foreclose that mortgage. After the execution of the mortgage—some fifteen or twenty days after—Sweeney discovered that Hammond had purchased, not for himself, but for Smith, and he instituted an action of detinue for the recovery of the horse, alleging that he had been defrauded by Smith in procuring the sale to be made. He recovered in that action, and has the horse in possession.—*Smith v. Sweeney*, ante p. 524.

Bixler's claim, as set up in his amended bill, is as follows: He had intrusted Smith with the sale of stock, and Smith had thus become indebted to him for the proceeds of such stock sold. They had an accounting, and Smith executed his note to him, due one day after date, for the ascertained balance. On the same day Smith executed the mortgage to Bixler to secure the payment of said note, and therein conveyed the horse in controversy. In the mortgage is a clause, binding Bixler not to enforce it, if the note was paid by a named day, some four months afterwards. It is not shown that Bixler, when he took the note and mortgage, had any notice of Sweeney's claim to the horse. There is no question that Bixler's claim is *bona fide*. Is he a purchaser in contemplation of law?

[Sweeney v. Bixler.]

It has long been settled, both in this court and elsewhere, that the inquiry, whether a mortgagee is a purchaser, depends on the question, whether he parted with any thing valuable, surrendered an existing right, incurred a fixed liability, or submitted to a loss or detriment, contemporaneously with the execution of the mortgage, or with the agreement, afterwards performed, to execute the mortgage. If either of these several categories be shown to exist, then the law presumes such act of the mortgagee was done or suffered in consideration of the mortgage executed, or to be executed. In any such case the mortgagee is a purchaser. He is a *bona fide* purchaser, if, at the time he so took the mortgage, he was without notice, actual or constructive, of an older, latent equity in another. What is sufficient notice to put him on inquiry, we do not propose to consider in this case. On the other hand, if the mortgage be taken to secure a pre-existing debt, and no new contemporaneous consideration passes, either of benefit to the mortgagor, or detriment to the mortgagee, then the mortgagee does not thereby become a purchaser.—*Boyd v. Beck*, 29 Ala. 703; *Wells v. Morrow*, 38 Ala. 125; *United States v. Hodge*, 6 How. U. S. 279; *Stevens v. Brennan*, 79 N. Y. 254; *Spurlock v. Sullivan*, 36 Texas, 511; *Thurman v. Stoddard*, 63 Ala. 336; *Whelan v. McCreary*, 64 Ala. 319; *Loeb v. Flash*, 65 Ala. 526.

In this State we have extended the doctrine of purchase, in favor of the mortgagee, farther than it has been announced in some other jurisdictions. With us, where the mortgage is even made to secure a pre-existing debt, if there be a valid, binding contemporaneous agreement to extend the debt to a future definite time, this the law holds to be a new, present consideration, of benefit to the mortgagor, and also of detriment to the mortgagee, which will constitute the latter a purchaser. But, to come within this rule, the agreed extension must be such as to disable the creditor (mortgagee) to sue, before the agreed, deferred day of payment arrives. So, with us, if property be conveyed in absolute payment and extinguishment of a pre-existing debt, this constitutes the grantee a purchaser. Whether a purchaser in that sense which cuts off prior equities, of course depends on the attendant circumstances, such as want of notice, etc.—*Thurman v. Stoddard*, 63 Ala. 336; *Thames v. Rembert*, *Ib.* 561; *Padgett v. Lawrence*, 10 Paige 170; *DeMott v. Starkey*, 3 Barb. Ch. 403. See also *Buller v. Harrison*, Cowp. 565; *McCune v. Belt*, 38 Mo. 281; *Headlee v. Van Lear*, 43 Mo. 235.

We do not consider there was any extension of the debt in this case, in the sense which will constitute Bixler a purchaser, as against Sweeney's latent right to the property. True the note was made payable one day after date. That is the usual



[Robinson v. Murphy.]

form observed in closing accounts, and in taking notes, evidencing a present indebtedness. We can not suppose the parties intended by this, either a benefit to Smith, the promissor, or any detriment to Bixler, the promisee. The extension of time within which the mortgage might be foreclosed, was no suspension of the right to collect the debt.

The decree of the chancellor is reversed, and a decree here rendered, dismissing complainant's bill. Let the costs of the original suit, and of the appeal both in the court below and in this court, be paid by the appellee.

## Robinson v. Murphy.

### *Bill in Equity to Enjoin Collection of Judgment at Law.*

1. *Appeals to this court; to what term returnable.*—An appeal taken to this court during vacation should be made returnable to the next ensuing term, and if not so taken, the appeal may be dismissed, on motion. An appeal taken during the session of the court may be made returnable to the first Tuesday of any succeeding month of the term, if there are ten days intervening between the taking of the appeal and the return day; and if such appeal is made returnable generally, it is irregular.

2. *Practice on appeal; when irregularity in taking an appeal is waived.* Such an irregularity may be cured by amendment, on objection made before a submission of the cause; and if the appellee appear and join in submitting the cause for decision upon the errors assigned, the irregularity is thereby waived, and the waiver can not be withdrawn without the appellant's consent.

3. *Same; assignment of error; when sufficient.*—An assignment of error averring that "the court below erred in the final decree rendered" on a stated day, although very general in terms, conforms to the long practice in this court; and it must be accepted as conforming to the rules of practice, when the decree of the chancery court is assailed as erroneous in the whole. This case distinguished from *Alexander v. Rea*, 50 Ala., 452, on this point.

4. *Attorney at law; the extent of his authority.*—An attorney at law is a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of his client. His authority to enter into bargains or contracts binding on his client, unless expressly conferred, is confined within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue, levy and return of executions on judgments which he may have obtained.

5. *Same; can not accept in satisfaction of judgment less than is due.* An attorney at law, by virtue of his general retainer, has no authority to accept in satisfaction of a judgment which he has obtained for a client, a less sum than is actually due, or for such sum, to transfer the judgment. Either transaction would be in excess of his authority and would not bind the client.

6. *Same; one dealing with, must ascertain extent of authority.*—All who

[Robinson v. Murphy.]

deal with an attorney or other agent, must ascertain the extent of his authority; and if they do not inquire, they can claim no protection, because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The bill in this cause was filed by John N. Murphy, the appellee, against Robert W. Robinson, the appellant, for the purpose of enjoining the latter from proceeding further to enforce the collection of a judgment which he had obtained against the appellee in the Circuit Court of Montgomery county, on the 30th June, 1878, for the sum of \$422.59, and on which he had caused an execution to be issued and levied on a lot of land in the city of Montgomery, as the property of the appellee. The material facts disclosed by the record are substantially as follows: On the 6th August, 1880, the appellee, through his attorney, made an agreement with an attorney at law, who appeared for and represented the appellant in the suit in the Circuit Court, in which the judgment was recovered, and who was then the appellant's attorney in the collection of the judgment, to settle and satisfy said judgment for \$200. This sum the appellee borrowed from one Nicrosi, and paid to appellant's said attorney, who received it in full satisfaction and discharge of the judgment, and, on the request of the appellee, he transferred and assigned, in the name of his client, and in consideration of said sum, the judgment to Nicrosi, who was to hold the same as security for the money which he had loaned to the appellee. The appellant's attorney acted in this transaction, in good faith, on his own responsibility, and for what he considered the best interest of his client, who was then absent, but without the authority, permission or consent of the appellant to accept said sum in satisfaction of the judgment, or to make a transfer thereof. Soon afterwards he communicated to the appellant what he had done, and the appellant promptly repudiated the settlement, and refused to ratify it or to receive the money. His attorney thereupon immediately notified both the appellee and Nicrosi that the appellant would not ratify the settlement which he had made, tendered to them the \$200 which he had received under the settlement, and demanded of them the surrender of the transfer of the judgment which he had made to Nicrosi. They both refused to receive back the money and to surrender the transfer. The appellant then instructed the sheriff to sell the lot on which had been levied the execution issued on said judgment; and the sheriff had advertised the same for sale, when the bill was filed. The evidence showed that appellant's attorney did not, at the time of the settlement or at any other time, represent to the appellee or his

[Robinson v. Murphy.]

attorney, that he had the authority or permission of the appellant to make the settlement. The evidence also showed that the attorney for the appellee believed that appellant's attorney was acting under the authority of his client, in making the settlement. Before the bill was filed, the appellee paid Nicrosi the \$200, which he had borrowed from him, and received from him the transfer of the judgment which had been made to him as security for that sum.

On the hearing, had on pleadings and evidence, the Chancery Court rendered a decree making perpetual the injunction which was issued when the bill was filed; and from this decree an appeal was taken on the 6th January, 1882, returnable to the December Term, 1881, of this court. The assignment of error, is, that "the court below erred in the final decree rendered Oct. 8th, 1881."

RICE & WILEY, for appellant. The English courts recognize the right of an attorney to make compromises, without the consent of his client, where he acts with due diligence and discretion, *before judgment is obtained*; but *after the judgment is obtained*, the attorney's power to compromise is at end. The American courts, however, hold, as a general rule, that an attorney at law has no right to compromise his client's claim *even before judgment*, without his consent.—*Derwort v. Loomer*, 21 Conn. 245; *Vail v. Conant*, 15 Vt. 314; *Doub v. Barnes*, 1 Md. Ch. 127; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Smock v. Dade*, 5 Randolph (Va.) 639; *Marbourg v. Smith*, 11 Kans. 562. An attorney at law has no authority, by virtue of his general employment, to settle a judgment or discharge an execution in favor of his client, unless upon payment of the *whole amount* thereof, without his client's consent.—*Chapman v. Cowles*, 41 Ala. pages 103-7, and cases there cited, to-wit: *Jones v. Ransom*, 3 Ind. 327; *Jewett v. Wadleigh*, 32 Maine, 110; *Jenney v. Delesdernier*, 20 Maine, 183; *Doub v. Barnes*, 4 Gill. 1; *Vail v. Conant*, 15 Vt. 314; *Smock v. Dade*, 5 Randolph, 639. See also, *Lewis v. Gamage*, 1 Pick. 347; *Jackson v. Bartlett*, 8 John. 285; *Keller v. Scott*, 2 Sm. & Mar. 83; *Gullett v. Lewis*, 3 Stew. 23; *Cost v. Genette*, 1 Porter, 212; *West v. Ball & Crommelin*, 12 Ala. 340; *Waring v. Lewis*, 53 Ala. 632.

GEO. F. MOORE, *contra*. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—An appeal taken during the vacation of this court should be made returnable to the next ensuing term, and if not so taken, may be dismissed on motion. If the ap-



[Robinson v. Murphy.]

peal is taken, as was this appeal, during the session of the court, it may be made returnable to the first Tuesday of any succeeding month of the term, if there are ten days intervening between the taking of the appeal and the return day. Code of 1876, § 3925. This appeal is made returnable generally to the present term, and is irregular. The irregularity could have been cured by an amendment, if objection had been interposed before the cause was submitted for decision.—Code of 1876, § 3931. Without objection the appellee appeared and joined in submitting the cause for decision, upon the errors assigned. Thereby the irregularity was waived, and the waiver can not be withdrawn without the consent of the appellant. *Thompson v. Lea*, 28 Ala. 453; *Meyers v. Segars*, 41 Ala. 385; *Alexander v. Nelson*, 42 Ala. 462. The assignment of error is in terms very general, yet it conforms to the long practice in this court. Without surprise upon the profession, when the decree of the chancellor is assailed as erroneous in the whole, an assignment of error, in the general terms of this assignment, must be accepted as conforming to the rules of practice. We certainly do not feel at liberty to disregard it entirely. The case is distinguishable from that of *Alexander v. Rea*, 50 Ala. 450, in which it was claimed the decree of the chancellor was partially erroneous, that specific errors infected it, which ought to have been assigned with precision. The error assigned by the appellants asserts that the decree as an entirety is erroneous.

The point of controversy, decisive of the case, is, whether an attorney at law, by virtue of his general retainer and authority, can accept in satisfaction of a judgment he has obtained for a client, a less sum than is really due, or for such sum transfer the judgment, binding the client. The authority of an attorney to compromise pending litigation is fully recognized in the English courts upon the theory that he is, as to the matters involved in the litigation, the general agent of the client. See elaborate note of Prof. Green to § 24, 8th Ed., Story on Agency; Wharton on Agency, §§ 587–92. These learned authors express the opinion that the doctrine of the American courts coincide with that of the English courts. There would be possibly much of difficulty in supporting the opinion by a protracted examination of the decided cases. Whether we could, in view of our former decisions, follow the English rule, it is not proper now to discuss. The client had obtained judgment, terminating litigation and its uncertainties, putting an end to all defenses that could have been urged to the demand, the subject of suit, and finally and conclusively ascertaining that he was entitled to have and recover of the defendant a certain, fixed sum of money. The negotiations between the attorneys of the parties, leading to the arrangement which is

[Robinson v. Murphy.]

termed a compromise, was not an offer to buy or sell peace against a doubtful or disputed claim, the subject of pending suit; it was intended as no more, and is no more in truth, than a proposition to satisfy the judgment by paying on the one side, and accepting on the other, a less sum than its full amount. There was no disputation of the amount or of the finality of the judgment. In all the negotiations there was nothing of a confidential character, which would have excluded whatever may have transpired between the attorneys from being admitted as evidence, if it became material in subsequent suits between the clients.—*Snodgrass v. Br. Bank of Decatur*, 25 Ala. 161.

Prior to our statute in reference to composition of debts, if this transaction had occurred between the plaintiff and the defendant in the judgment, the acceptance of a less sum in payment would not have operated its satisfaction. There is a want of a valuable consideration for the agreement of a creditor to remit the whole, on the payment of a part of a just and ascertained debt.—*Barron v. Vandvert*, 13 Ala. 232; *Pearson v. Thomason*, 15 Ala. 700. It may be that under the statute, if the parties themselves had been the actors, there would have been a settlement in writing for the composition of the judgment, to which effect would have been given according to their intention without inquiring into the consideration.

The power of an attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is, as has been said in numerous decisions of this court, a *special agent*, limited in duty and authority to the vigilant prosecution or defense of the rights of the client. He can enter into no bargains or contracts, though he may make agreements in writing touching the course of proceedings in pending suits, or the issue or return of executions on judgments he may have obtained, which will bind the client, unless he has specially authorized, or subsequently ratified them.—1 Brick. Dig. 191, § 30; *Albertson v. Goldsby*, 28 Ala. 711. On the payment of money to him after judgment he may give a valid receipt, but a sale or assignment of the judgment does not lie within the scope of his authority. *Boren v. McGehee*, 6 Port. 432. Nor can he accept anything but money in satisfaction of the debt or judgment of the client. Within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue, levy and return of executions, the attorney may have large discretionary powers given to him, that he may perfect and promote the rights and interests of the client. But entering into bargains or contracts by which the debt of the client is released or discharged without full payment in money, is not one of his general powers. If the power is not specially conferred, the validity of all such

[Robinson v. Murphy.]

bargains or contracts, so far as they affect the client, depends upon his ratification. He may ratify or repudiate as he may believe most conducive to his interest.—*Kirk's Appeal*, 87 Penn. St. 243 (S. C., 30 Am. Rep., 357); *Levy v. Brown*, 56 Miss. 83; *Maddox v. Reeves*, 39 Md. 485; *Moye v. Cogwell*, 69 N. C. 93.

All who deal with an attorney or other agent must ascertain the extent of his authority. If they do not inquire, they can claim no protection because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising.—*Gullett v. Lewis*, 3 Stew. 23. The law defined the extent of the general power of the attorney, and is presumed to be known of all men, more than fifty years ago. In the case of *Gullett v. Lewis*, *supra*, the power of an attorney at law was defined, this court saying: He "is the special agent of his client, whose duties usually are confined to the vigilant prosecution or defense of the suitor's rights. By virtue of his engagement as an attorney, he is not authorized to compromise the matter of controversy, to execute a release of his client's demand, or even to release the responsibility of a witness to his client, that he may be rendered competent." The compromise of which the court was speaking, was not an adjustment of pending litigation, but the composition of an admitted debt. The authority of this case has never been disputed, and it has been often cited with approbation, as defining accurately the general power of an attorney.—*West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103. Whoever has dealt, or may in this State deal with an attorney, can have no right to rely on his exercise of any other power, unless it is specially conferred. Whether it has been specially conferred, they must, at their own peril, ascertain. The acceptance by the attorney of a less sum than was due upon the judgment did not operate its satisfaction; and the transfer or assignment of the judgment was in excess of his authority.

The decree of the chancellor must be reversed, the injunction dissolved, and the bill dismissed. The appellee must pay the cost of appeal in this court, and the court of chancery, and the costs in the court of chancery, to be taxed by the register.



**Wolffe v. Wolff & Bro.***Action for Use and Occupation.*

1. *Landlord and tenant; effect of tenant's holding over after expiration of his term.*—Where a tenant for years holds over after the expiration of his term, the landlord may, at his option, treat him as a tenant and insist upon the continuance of his tenancy for another year; and if he elect so to do, the law will imply an agreement on the part of the tenant to hold or continue the lease for another year upon the same terms and conditions.

2. *Same; when landlord's right not impaired by act of the tenant.*—In such case, the right of the landlord to insist upon the continuance of the tenancy, is not impaired by the tenant's refusal to renew the lease, or by notice to the landlord, that he had rented other premises, with the intention to vacate within a few days, or by the fact that such other premises were not ready for him.

3. *Same; when a tenant holds over a tender of quantum valebat not sufficient.*—Where a tenant who held under a prior lease for a term of one year, holds over for ten days after the expiration of his term, and after notice from the landlord that, if he persisted in holding over, he would elect to charge him as tenant for the next ensuing year, an obligation to pay rent for the whole year was thereby fastened upon him, and a tender by him of a mere *quantum valebat* for the period of actual occupancy, is not sufficient.

4. *Same; when tenant's liability not affected by second renting.*—In such case, the fact, that after the tenant had abandoned the possession of the leased premises, a party, who was the agent of the landlord, rented the premises to another for a part of the unexpired term, put him in possession and collected the rents, not for and on account of the landlord, but "on account of whom it might concern," does not affect the original tenant's liability, when it is shown that such arrangement was made with the consent of both parties, and with the express understanding that it was to be without prejudice to the rights of either of them.

5. *Remedy against tenant holding over.*—Where a tenant for years holds over, and the landlord elects to treat him as tenant, an action for use and occupation arising from an implied *assumpsit*, will lie; or, it seems, the landlord may bring an action on the case for special damages.

APPEAL from Montgomery Circuit Court.

Tried before HON. JOHN P. HUBBARD.

This was an action of *assumpsit* for the use and occupation of a certain store-house in the city of Montgomery, from the 1st October, 1879, to the 1st October, 1880; was brought by B Wolff & Bro. against Frederick Wolffe, and was commenced on May 10th, 1881. The defendant pleaded, in short by consent, the general issue, "with leave to give in evidence any matter, which might be specially pleaded, including the right of defendant to prove on the trial, that before the 1st day of Oc-

[Wolffe v. Wolff &amp; Bro.]

tober, 1879, defendant gave notice to plaintiffs that he would not rent, nor otherwise hold the property mentioned and described in the complaint, for the rental year beginning on the 1st day of October, 1879, but that he, defendant, would surrender the same to plaintiffs at some early day during said month of October, and that he did accordingly surrender possession to plaintiffs, or their agents, and did vacate and quit said premises upon, to-wit: the 10th day of October 1879."

On the trial the plaintiffs introduced evidence showing that the defendant, in September, 1874, rented the premises mentioned and described in the complaint, by written contract, from Moses Bros., the plaintiffs' agents, for the term of three years, beginning on 1st October, 1874, and ending, October 1st, 1877, at an annual rent of eight hundred dollars, payable in equal monthly installments; that upon the expiration of this lease, it was verbally renewed until October 1st, 1878, and then again verbally renewed for the year ending September 30th, 1879, the defendant continuing to occupy the rented premises; that on 29th September, 1879, plaintiffs notified defendant that they had leased or rented said premises to one Abraham for one year to commence on 1st October, 1879, and demanded a surrender of the premises on the 1st October, 1879; that defendant, in reply, stated that he had leased in writing another store then in process of construction, but not completed, for a term of five years beginning on 1st October, 1879; that it would be impossible for him to vacate said premises on that day, but that he would do so at some early day during the month of October, and that he was ready to pay a reasonable and fair price for the use and occupation of said premises during his unavoidable occupancy thereof; and that on 30th September, 1879, the plaintiffs, through their agents, Moses Bros., notified the defendant in writing to surrender possession of the premises at the expiration of the current lease, and that in case of his failure to do so, the plaintiffs would hold him responsible as having renewed his present lease on same terms for another year, commencing October 1st, 1879; and to this the defendant made the same reply, in substance, that he made to the first notice. The plaintiffs' evidence also showed that the defendant occupied said premises until 10th October, 1879, when he vacated and quit them, and tendered the keys to plaintiffs' said agents, Moses Bros., who refused to receive them; that the plaintiffs had rented the premises to one Abraham for one year to commence on 1st October, 1879, and that he refused to take the premises when the defendant failed to vacate on that day; that Moses Bros., on 15th November, 1879, rented the premises "for the balance of the said rental year, with the consent and knowledge of both plaintiffs and defendant; and without prejudice to the

[Wolffe v. Wolff &amp; Bro.]

rights of either party, 'on account of whom it might concern,' to one Simon Hertz," at a given price; that Hertz remained in the store only a part of the year, and then failed in business, abandoned the premises and left Montgomery; that they only collected from Hertz \$180, which they still held "on account of whom it might concern;" that in renting the store to Hertz they did not act as the agents of either the plaintiffs or defendant; and that after Hertz left, the premises remained unoccupied during the balance of the unexpired term.

The defendant offered proof showing that in June, 1879, he rented, by written contract duly executed, for a term of five years, commencing on 1st October, 1879, another store in the City of Montgomery, and that unavoidably the store was not ready or fit for occupancy on 1st October; but the court, on plaintiffs' objection, refused to allow the defendant to make the offered proof, and he excepted. He then "proved that he occupied the said premises only until the 10th day of October, 1879, and then tendered the keys thereof, in good faith, to said agents of plaintiffs, Moses Bros., who refused to accept the same;" and that "he emphatically refused to rent the said premises of plaintiffs for another rental year, commencing October 1st, 1879, or otherwise to hold, or occupy, control, or have any connection, in anywise or manner whatever, with the said premises any longer than, or after the 10th day of October, 1879—up to which last named day" the other store which he had rented was not in a fit condition to be occupied by him. Defendant then offered to prove that, in the latter part of October, 1879, he tendered plaintiffs \$50 for the use and occupation of their said premises for the ten days in October during which he had occupied them; but, on plaintiffs' objection, the court refused to allow the defendant to make the offered proof, and he excepted.

The foregoing being the substance of the evidence introduced on the trial, "the court, *ex mero motu*, charged the jury, that, if the jury believe from the evidence, that there was a contract of renting of the premises mentioned in the complaint between plaintiffs and defendant, for the rental year ending September 30th, 1879; that plaintiffs on said last mentioned day demanded possession thereof of the defendant, and he refused to surrender such possession, but continued to occupy said premises until the 10th day of October, 1879, then the plaintiffs had the right to treat the defendant as having renewed his lease for another year; and plaintiffs would be entitled to recover in this case one year's rent, at the rate of eight hundred dollars *per annum*, with the interest thereon from the 1st day of October, 1880." To this charge the defendant excepted.

The court, at the written request of the plaintiffs, gave to the jury the following charge, and the defendant excepted, to-



[Wolffe v. Wolff &amp; Bro.]

wit: "That if the jury find from the evidence that the renting in November, 1879, was to Hertz 'on account of whom it might concern,' and that B. Wolff & Bro. and Fred. Wolffe assented that Moses Bros. might rent to Hertz in that way, without affecting the rights of either party, then such renting would not prevent the plaintiffs from recovering in this suit for the year commencing on 1st October, 1879, and ending on 1st October, 1880."

The defendant then requested the court to give to the jury the following written charges: 1. "If the jury believe from the evidence that the defendant, on the 10th day of October, 1879, tendered to plaintiffs, or their agents, the keys to the premises described in the complaint, and had at that time vacated and quit the premises, then the measure of damages is the actual rental value of the premises from the 1st day of October, 1879, to the time such keys were tendered." 2. "If the jury believe from the evidence that Moses Bros. rented the premises in controversy on or about the 15th of November, 1879, to one Simon Hertz, for fifty dollars per month, for the balance of the rental year, ending October 1st, 1880, payable monthly, and that the plaintiffs agreed to said renting and accepted said tenant, Hertz, then the plaintiffs can not recover damages for the occupation and use of said premises, in this case, for a period of time longer than said 15th day of November, 1879; and the measure of damages is the rental value of the premises from the 1st day of October, 1879, to the time said premises were leased to Hertz, as aforesaid." 3. "If the jury believe from the evidence that the defendant, in September, 1874, rented the premises mentioned and described in the complaint, from Moses Bros., as agents of plaintiffs, under a written lease or contract of renting, for a period of three years, beginning on the 1st of October, 1874, and ending October 1st, 1877, at the sum of eight hundred dollars *per annum*, payable monthly; and that, upon the expiration of said written lease, defendant continued to occupy the premises at the same rent *per annum*, and payable monthly, and no other written lease was made and executed between the parties, and that defendant refused to occupy or hold said premises longer than the 10th of October, 1879, then plaintiffs can not recover damages in this case, except for the time said premises were actually occupied by defendant, to-wit: to the 10th day of October, 1879, when the premises were vacated by him; and the measure of damages will be the rental value of the property from the 1st of October, 1879, to the time defendant quit the said premises." 4. "If the jury believe from the evidence that the defendant, in September, 1874, rented the premises described in the complaint in this case, from Moses Bros., as agents of the plaintiffs, under a written lease,

[Wolfe v. Wolff &amp; Bro.]

or contract of renting, for a term of three years, to begin on the 1st day of October, 1874, and to end on the 1st of October, 1877, at and for the price or sum of eight hundred dollars *per annum*, payable in monthly installments; and that upon the expiration of said written lease, defendant continued to occupy the premises at the same rent *per annum*, payable monthly, and under no other contract of renting; and that defendant refused to renew his contract of renting for another year, then the plaintiffs can not recover damages in this case, except for the time the said premises were actually occupied by the defendant, to-wit: to the 10th day of October, 1879, the time when the defendant vacated said premises; and the measure of damages will be the rental value of the said premises from the 1st day of October, 1879, to the time the defendant quit the said premises."

5. "If the jury believe from the evidence that before the expiration of the renting, ending September 30th, 1879, the plaintiffs, or their agents, were notified by defendant that he would not rent, or otherwise hold the premises of plaintiffs longer than for a few days in October, and only until the ground floor of the Tyson building, on Commerce street, in the city of Montgomery [the other store which the defendant had rented], was fit for occupancy by him; and if the jury further believe from the evidence that defendant did not hold said premises after the 10th day of October, 1879; that on that day he tendered the keys of said premises to the plaintiffs' agents, in good faith, then the defendant is not liable for the rent of said premises for the rental year beginning October 1st, 1879, at the rate of rent which had been agreed on between them as the rent of the previous year." These charges the court refused to give, and the defendant separately excepted.

The trial resulted in a verdict and judgment for the plaintiffs for \$904.45, from which the defendant appealed; and he here assigns as error the rulings of the Circuit Court above noted.

RICE & WILEY, for appellant.

WATTS & SONS, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The principle is too well established for further controversy, that, where a tenant for years holds over after the expiration of his term, the law will imply an agreement to hold, or continue the lease, for another year, upon the terms and conditions of the prior lease. It is the duty of a tenant, so soon as the period of his tenancy expires, to peaceably surrender the possession of the demised premises to his land-

[Wolffe v. Wolff &amp; Bro.]

lord, and if he neglects or refuses to do so, the landlord may treat him either as a *trespasser*, or as a *tenant*, according as his own option may dictate.—Taylor's Landlord and Tenant, § 22; *Schuyler v. Smith*, 51 N. Y. 309 (S. C., 10 Amer. Rep. 609); 4 Wait's Act. and Def. 218, § 5.

In all such cases, where there is a holding over by the tenant, the right of the landlord to insist upon the continuance of the tenancy is, in no wise, affected by the fact that the tenant refuses to renew the lease, and gives notice that he has rented other premises with the expressed intention to vacate within a few days. The tenant can not be permitted to enjoy the benefits of continued possession, and at the same time capriciously repudiate the attendant burden of paying just and reasonable rent. Though he may expressly refuse to promise, the law raises such obligation on his part by necessary implication, if the landlord elects to still regard him as a tenant.—*Schuyler v. Smith*, 10 Amer. Rep. 609, *supra*; Taylor's Land. and Ten. § 22; *Hemp-hill v. Flynn*, 2 Barr (Penn.), 144; *Bacon v. Brown*, 9 Conn. 334; *Noel v. McCrory*, 7 Cald. (Tenn.) 623; *Harkins v. Pope*, 10 Ala. 493; *Schwisler v. Ames*, 16 Ala. 73.

In the case of *Witt v. The Mayor of New York*, 5 Robert. (N. Y.) 248 (S. C., 6 Robt. 441), the tenants gave notice to their landlord that they had hired other premises, and expressly declined another year's tenancy. They held over *twelve days*, during which time they were engaged in effecting a removal. They were adjudged to be liable for another year at the election of the landlord. A similar ruling was announced in *Conway v. Starkweather*, 1 Denio (N. Y.), 113, where the tenant held over without authority for the space of *two weeks*, and it was held to be immaterial that the tenant gave notice that he had hired other premises, and communicated to the landlord his determination not to hold over another year.

The form of action in such cases, it seems, may be either for use and occupation, arising from an implied *assumpsit*, or an action on the case for special damages.—*Bramley v. Chesterton*, 2 Common Bench Rep. N. S. 592; *Crommelin v. Thiess & Co.*, 31 Ala. 412.

Under these principles, we can see no error in the rulings of the Circuit Court as appearing in the record. The appellant had been the tenant of the appellees for several years prior to October 1, 1879, holding from year to year. He had timely notice that the premises in controversy had been leased to another tenant for the following year, and that he was required to vacate by the first of October, 1879, which was the day of the expiration of his tenancy. It was his fault, not the fault of his landlords, the appellees, that he was unavoidably prevented from moving by the incomplete condition of the premises which



[Shipman v. Furniss.]

he purposed to occupy for the ensuing year. His holding over for *ten days* fastened on him an obligation to pay rent for the whole year, and it was not sufficient to tender a mere *quantum valebat* for the period of actual occupancy, especially in view of the fact that the appellees had expressly notified him that, if he persisted in holding over, they would elect to charge him as a tenant for the next ensuing year. And it is further manifest that, by reason of this act on the part of appellant, the appellees lost the opportunity of obtaining a tenant, as they might otherwise have done.

The renting of the premises *ad interim* by Moses Bros. to Hertz, "on account of whom it might concern," did not affect the merits of this case. It was done with the consent and knowledge of both parties to the suit, and was understood expressly to be without prejudice to the rights of either party.

The judgment of the Circuit Court must be affirmed.

## Shipman v. Furniss.

*Bill in Equity to have Deed to Lands declared Void as obtained by Fraud and Undue Influence, and to have it Cancelled as a Cloud upon the Title.*

1. *Deed obtained by undue influence voidable merely.*—Where the execution of a deed is procured by undue influence, the deed is voidable merely, and not absolutely void.

2. *Cloud upon the title; jurisdiction of court of equity to remove.*—While it is true that the jurisdiction of a court of equity can not be invoked, when the sole ground of equitable interference is the removal of a cloud from the title, unless the complainant is at the time in possession, the rule is different, when other distinct grounds of jurisdiction are averred. In such case, the court, having assumed jurisdiction for one purpose, will retain it, that the whole litigation may be settled, and complete justice be done between the parties.

3. *Same.*—Hence, a court of equity will entertain a bill filed to have a deed cancelled, the execution of which is shown by proper averments to have been procured by fraud and undue influence, notwithstanding the fact, that the complainant is out of possession.

4. *When averments of bill not repugnant.*—Where in a bill filed to have a deed to lands declared void as obtained by fraud and undue influence, and cancelled as a cloud upon the title, it is shown, by appropriate averments, that the grantor's signature was obtained by fraud and undue influence, and that the deed was recorded, and the grantee was in possession, claiming under it, there is no objectionable repugnancy in averments touching the delivery of the deed, one of which, based on information and belief, is, that the deed was never in fact delivered, and was for this reason inoperative; and the other is, that if complainant is mistaken in

[Shipman v. Furniss.]

this, and the deed was delivered, its delivery was procured by the fraud and undue influence, which induced the grantor to sign it.

5. *Parties bearing towards each other confidential relations; dealings between.*—The rule that dealings between parties bearing towards each other confidential relations will be jealously watched by the courts, is not confined to relations strictly fiduciary, but extends to “all the variety of relations in which dominion may be exercised by one person over another.”

6. *Undue influence; when inferred.*—While undue influence is a species of constructive fraud which the courts will not undertake to define by any fixed principles, its exercise may be inferred in all cases of confidential, or *quasi* confidential relations, where the power of the person receiving a gift, or other like benefit, has been so exercised over the mind of the donor as, by improper acts or circumvention, to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion.

7. *Same; burden of proof.*—Where one, living in illicit sexual relations with another, gives to such person property of considerable value, especially where the donor, in making the gift, excludes natural objects of his bounty, the transaction will be viewed by a court of equity with such suspicion, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence.

8. *Same; when deed obtained by.*—Where a young man, addicted to strong drink and lewd dissipation, the excessive indulgence in which had impaired both his mind and body, executed a deed of gift conveying a large and valuable tract of land, constituting substantially all his property, to a common prostitute, who had and exercised over him a strong influence, and with whom he had been living for some time as his wife under a marriage ceremony which was void by reason of her prior marriage with another who was still living, the grantor thereby preferring her to the exclusion of his own blood relations, the transaction not only challenges the duty of the courts to watchfulness and jealousy in scanning the circumstances under which the deed was executed, but is persuasive to impress the judicial mind with a conviction, that the will and judgment of the grantor were brought under illegitimate constraint in producing so unnatural a result.

9. *Same.*—In such case, if the donor executed the deed with an honest belief that his marriage with the donee was lawful and valid, he executed it under a false and fraudulent hypothesis, and, for this reason, the deed could be avoided, as having been procured by artifice, circumvention and fraud.

10. *Deed to grantor's paramour; when void.*—And if he was aware of the illegality of his marriage, the deed must be construed, under all the facts of the case, to have been made in contemplation of the continuance of their adulterous intercourse, thus presenting the case of an executed contract, founded upon an illegal consideration, against which a court of equity will grant relief, when, by undue influence, the donee has procured its execution.

APPEAL from Dallas Chancery Court.

Heard before Hon. CHARLES TURNER.

The facts are stated in the opinion.

BROOKS & ROY, with whom were REID & MAY, for appellants. (1). The jurisdiction of the court in this case can not be maintained on the ground of removing a cloud from the title, because it is averred, proven, and admitted that the com-

[Shipman v. Furniss.]

plainant was not in possession.—*Arnett v. Bailey*, 60 Ala. 438; *Jones v. De Graffenreid*, *Ib.* 151. (2). There is no such averment of fraud as will confer jurisdiction. The fraud, duress, conspiracy and undue influence charged, are alleged to have procured the *signing* of a deed, which the bill itself, in substance and effect, avers was *never delivered or executed*, and *never became a deed*. If execution of the deed had been averred, the bill would have shown a “mere fraud” cognizable at law. But its execution and delivery being denied, the bill shows a mere *attempt* at fraud, never consummated, and this will not support the jurisdiction. (3). But it being shown by the evidence that the deed was delivered, it is insisted that the complainant is entitled to relief on what is called the “alternative” averment of the bill touching the delivery of the deed. This averment is, in substance, that, if the complainant is mistaken, and the deed was *delivered*, then Mathews was induced to deliver the deed by fraud, etc. This is no averment of any fact or thing whatever. It certainly does not show that the deed was executed; it neither denies nor admits its execution, but insists that *if* executed, it is void for fraud, etc. It is a cardinal rule in chancery pleading, that the facts upon which the complainant relies for relief “must appear, *not by inference*, but by *direct and unambiguous* averment.”—*Duckworth v. Duckworth*, 35 Ala. 70; 29 Ala. 367. This so-called averment seeks to assail the validity of an instrument or deed, which it does not show has any existence, and which the bill in the former part thereof distinctly avers was never delivered. But a decree granting relief must be *founded on the facts stated in the bill*.—*Charles v. Du Bose*, 29 Ala. 367; *Rives, Battle & Co. v. Walthall*, 38 Ala. 332; *Colton v. Ross*, 2 Paige, 396; 1 Barbour Ch. R. 329; *McKinley v. Irwin*, 13 Ala. 681–95; *Alexander v. Taylor*, 56 Ala. 63; 34 Ala. 626; 40 Ala. 587; 41 Ala. 693; 56 Ala. 584. Hence, no relief can be predicated upon the existence or execution of the deed, upon the ground that it is fraudulent, when it does not appear by direct averment, that the deed was delivered, much less when its delivery is expressly and distinctly denied. (4). The rule is that alternative averments are insufficient, unless *each* averment presents a case entitling the complainant to the relief sought.—*David v. Shepard*, 40 Ala. 587; 34 Ala. 626; 8 Ala. 920. (5). On a decree *pro confesso*, the court would not know what decree to render. The relief would not be the same, but repugnant. (6). “The influence which the law repudiates is *undue* influence; denominated undue, because it is *unrighteous, illegal, and designed to perpetrate a wrong*. The undue influence exerted to procure the execution of a deed or will must amount to *fraud or coercion*. The grantor must be overreached



[Shipman v. Furniss.]

and deceived by some false representation or stratagem, or by coercion, physical or moral.”—*Davis v. Culver*, 13 How. (N. Y.) 62; 4 U. S. Dig. p. 582, § 2553. The influence which is the result of solicitation, argument, persuasion, attachment or affection, is not undue influence. To be undue it must prevent the exercise of discretion, destroy free agency, amount to moral coercion, and constrain its subject to *do what is against his will*.—*Gilbert v. Gilbert*, 22 Ala. 532; *Hall v. Hall*, 38 Ala. 134; *Taylor v. Kelley*, 31 Ala. 70; *Leverett v. Carlisle*, 19 Ala. 80; *Pool v. Pool*, 33 Ala. 145; *Leeper v. Taylor*, 47 Ala. 222; *Bailey v. Litten*, 52 Ala. 282. And the free agency must be destroyed at the time the instrument is executed.—14 U. S. Dig. 293, § 1092; 43 Penn. 46; 20 Penn. 329. The influence of affection and attachment, or the desire to gratify another, instead of being against the validity of the instrument, “would be very strong ground in favor of a testamentary act.”—*Taylor v. Kelley*, 31 Ala. 70. On the question of undue influence, see also *Leverett’s Heirs v. Carlisle*, 19 Ala. 80; *Clarke v. Sawyer*, 3 Sanf. Ch. 352; *Gardner v. Gardner*, 22 Wend. 526, 538–42; *Farr v. Thompson*, Cheves (S. C.), 37; 14 U. S. Dig. 294, § 1095. (7). The bill charges fraud and undue influence. “Fraud and undue influence are not presumed. Whoever, in a court of equity, bases a right to the rescission or cancellation of a contract on allegations of either or both, must *distinctly allege*, and *clearly prove* the fraud or undue influence.”—*Bailey v. Litten*, 52 Ala. 284. See also Kerr on Fraud and Mistake, 190–1; 1 Greenl. on Ev. § 74; *Gardner v. Gardner*, 22 Wend. 540; *Tompkins v. Nichols*, 53 Ala. 200; *Pool’s Heirs v. Pool’s Ex’r*, 33 Ala. 145. This is the general rule. The exceptions are where the parties occupy *fiduciary relations*, as principal and agent, trustee and *cestui que trust* and the like; examples of which are, *Waddell v. Lanier*, 62 Ala. 348; *Todd v. Grove*, 33 Md. 188. But it is contended the exception extends to parties, between whom exist “illegal sexual relations,” not because that is a “fiduciary” relation, but because the relation itself is illegal; and we are cited to Cooley on Torts, p. 515; Bigelow on Frauds, p. 271. But these authorities refer to the decision in *Dean v. Negley*, 41 Penn. St. 312; and the court in that case expressly and directly refused to hold that such an illegal relation would raise any “presumption in law,” which would shift the *onus*. See also *Gracie v. Potter*, 58 Ala. 307. The *onus* is not therefore shifted in this case. (8). “Past seduction of, or cohabitation with a female seems to afford a sufficient consideration for an express promise to pay money to her, or for her support, there being a *moral obligation* to redress as far as possible the injury inflicted.”—Chitty on Contracts, p. 49; *Shenk v. Mingle*, 13 Serg. & Rawle, 29; *Gibson v. Dickie*,

[Shipman v. Furniss.]

3 M. & Selw. 463; *Binnington v. Wallis*, 4 B. & Adol. 650. And this doctrine was maintained and enforced in a case where "the plaintiff was a *common prostitute* when the defendant first became acquainted with her."—*Chitty* on Con. p. 661; *Friend v. Harrison*, 2 C. & P. p. 584. See also on this point: *Story* on Con. p. 541, and authorities cited; *Kerr* on Fraud & Mistake, 194; *Hargrove v. Everard*, 6 Ir. Ch. 278; 1 *Story's* Eq. Jur. § 182 A; *Giles v. Giles*, 1 Keen, 685; *Farr v. Thompson*, 1 Cheeves (S. C.), 37; 14 U. S. Dig. p. 294, § 1085. We do not mean to say that, if the contract were *executory* and founded on the consideration of *future* illicit intercourse, the courts would enforce it. On the contrary, when the consideration is illegal, the courts will stand off and refuse to help either party; and if the contract be *executed*, the courts will refuse to set it aside, on the maxim, *In pari delicto potior est conditio possidentis*.—2 *Kent's* Com. m. p. 467; 1 *Brick. Dig.* 377, § 32; *Wood v. Duncan*, 9 Port. 227; *Walker v. Gregory*, 36 Ala. 184.

PETTUS, DAWSON & TILLMAN, *contra*.—(1). It is admitted that the rule in this State is, that a party out of possession can not file a bill *merely to remove a cloud* from his title, without stating *some ground of equitable jurisdiction, in addition to the existence of the cloud*. But it is well settled that where the owner is *in possession*, that fact and the existence of a cloud on the title, *without any other fact*, gives a court of equity jurisdiction to remove the cloud.—*Burt v. Cassety*, 12 Ala. 734; *Rea v. Longstreet*, 54 Ala. 294, and cases cited. (2). It is also well settled, that when a bill contains other and independent grounds of equity jurisdiction, "the court will settle the litigation and do complete justice, without remitting the parties to a court of law, though *as to some features of the case*, the remedy at law is adequate."—*Lockett v. Hurt*, 57 Ala. 198; 1 *Story's* Eq. Jur. §§ 228–9; *Daniel v. Stewart*, 55 Ala. 278. (3). In this case the equity of the bill does not rest alone on the averment, that the deed sought to be cancelled, is a cloud upon the title; but on the additional averment, that the *deed was procured by fraud and undue influence*, a distinct and independent ground of jurisdiction.—1 *Story's* Eq. Jur. § 184; *Chesterfield v. Janssen*, 2 Ves. Sr. 125; *Chambers v. Crook*, 42 Ala. 171; *Boney v. Hollingsworth*, 23 Ala. 690; *Kennedy v. Kennedy*, 2 Ala. 571; *Whelan v. Whelan*, 3 Cowen, 537; 3 *Lead. Cases* in Eq. 124. (4). If the deed had never been in fact delivered, it constituted a cloud upon complainant's title, embarrassing alienation, and should be cancelled. It is shown to be of record in the hands of the defendant, Shipman, who was in possession of the lands claiming title thereunder. In such a case a court of equity should interfere, it being shown that the

[Shipman v. Furniss.]

grantor's signature was obtained thereto by fraud and undue influence.—*Bunce v. Gallagher*, 5 Blatch. 481; *Brewton v. Smith*, 28 Ga. 442. The contrary doctrine was announced in *Pratt v. Pond*, 5 Allen, 59; but that case was expressly decided on a statute of Massachusetts. A deed *signed* by an insane person will be cancelled in equity, on proper application, although such person could not *execute* or *deliver* the deed.—1 Story's Eq. Jur. §§ 228–9. See also *Donelson v. Posey*, 13 Ala., on pages 767–8. Whether, then, the deed was *delivered* or *not*, the relief to which the complainant is entitled is the same; and hence, there is no objectionable repugnancy in the alternative averments of the bill touching the execution of the deed. (5). The deed recites as its consideration the love and affection which the grantor bore towards “*his wife*.” This recital is shown to be false. The deed is thus impeached for its own falsehood, and can not, therefore, stand by its own force.—*Watt v. Grove*, 2 Sch. & Lef. m. p. 501; *Gibson v. Russell*, 21 Eng. Ch. Rep., note on pp. 120–1–2; *Broderick v. Broderick*, 1 Pere Wms. m. p. 239; *Dunnage v. White*, 1 Swans. p. 137; *Kennell v. Abbott*, 4 Ves. Jr. 802. (6). The facts of this case show a clear case of fraud and undue influence; and the deed should be cancelled.—Hill on Trustees, pp. 213–14; 1 Story's Eq. Jur. § 234 *et seq.*; *Harding v. Wheaton*, 2 Mas. 378; *Harding v. Handy*, 11 Wheat. 125; *Allore v. Jewell*, 4 Otto, 506; *Sears v. Shafer*, 6 N. Y. 268; *Huguenin v. Basely*, 3 Lead. Cases in Eq. p. 94 *et seq.* and authorities cited. (7). It being shown that the woman had a strong, controlling influence over Mathews, the courts will scrutinize the transaction as closely and jealously as they would transactions between persons occupying fiduciary relations towards each other.—*Gibson v. Russell*, 21 Eng. Ch. Rep. p. 120, note. (8). The influence which the woman had over Mathews is by law *presumed* to have been undue influence, from their illicit relation to each other.—*Leighton v. Orr*, 44 Iowa, 689; *Dean v. Negley*, 41 Penn. St. 312; *Kessinger v. Kessinger*, 37 Ind. 341; *Bevins v. Jarnigan*, 59 Tenn. 282; Cooley on Torts, p. 515; Bigelow on Fraud, p. 271.

SOMERVILLE, J.—The bill in this cause was filed by the appellee, as contingent remainderman, under the will of her grandfather, Joel E. Mathews, Sr., deceased, for the purpose of setting aside a deed of gift to certain lands executed by Joel E. Mathews, Jr., the son of Joel E. Mathews, Sr., to one Kenney, as trustee for Mary A. Shipman, *alias* Mathews, on the alleged ground of fraud and undue influence, averred to have been used in procuring its execution. It is sought to have the deed cancelled as a cloud on the appellee's title.

The salient facts of the case may be succinctly stated as follows.



[Shipman v. Furniss.]

lows: Mary A. Shipman, formerly Mary Kenney, was lawfully married to John A. Shipman, in December, 1865, in the State of Georgia. After living with him for a few years, she abandoned him clandestinely under circumstances indicating both her lack of chastity and honesty, and soon took refuge in a house of prostitution. She is shown to have been a woman of personal beauty, attractive manners, and of more than ordinary intelligence, shrewdness and will power, and seems to have unremittingly plied her vocation as a prostitute up to the transactions detailed in the bill.

While in the city of Selma, Alabama, in a house of ill-fame, she formed the acquaintance of Joel E. Mathews, Jr., the grantor in said conveyance, who is shown to have been a young man of most reputable relationship, and of considerable wealth, but a slave to drunken, immoral, and dissolute habits. An illicit intimacy sprang up between the two, and all the facts evince that Mathews was possessed of an inordinate infatuation for the woman, and that he was daily brought more and more under the domination of the unlawful influence. Believing her to be a single woman, he followed her to Georgia, and went through the formalities of a clandestine marriage with her, in the town of Marietta, on the 11th day of April, 1876. They afterwards returned to Selma, and openly continued the adulterous intimacy, until the date of Mathews' death, in January, 1878, he publicly claiming her as his lawful wife, and taking her to reside with him at his plantation near Selma, in the county of Dallas, the premises conveyed to her in the deed of gift, and which are here in controversy.

This conveyance was executed on December, 19th, 1876, and the consideration of it is recited to be natural love and affection for the grantee as *his wife*, and the nominal sum of one dollar. It swept away substantially all of the grantor's property, leaving him nothing, and was withheld from the record until the death of the grantor, after which it was registered. Mrs. Shipman's own attorney drafted the instrument, and she accompanied Mathews to the city, and also to the attorney's office, both when instructions were given for its preparation, and at the time when it was signed. The evidence fails to show that any compulsion was used, tending to overcome the free agency of Mathews at the immediate time the deed was signed, but his habits of frequent and excessive intoxication, and sexual indulgence seem to have impaired both his mental and physical condition previous to this time. Facts had been brought to his knowledge, prior to this period, which probably caused him to seriously doubt the legality of his marriage, but he seems to have continued to act upon the theory of its validity, and during the following year allowed the reputed wife to institute pro-

[Shipman v. Furniss.]

ceedings in a court of chancery to have herself declared a "free dealer," under the provisions of the statute authorizing *married women* to be made free dealers.

The evidence further discloses, that Mrs. Shipman, both before and after the pretended marriage with Mathews, was continuously and openly on terms of intimate and illicit relationship with one William A. Owen, who is proved to have been a man of dissolute habits, quarrelsome nature, and of overbearing and domineering disposition. He seems to have been the constant associate of both Mrs. Shipman and of Mathews, and by his force of character and harsh treatment, to have acquired great influence with the latter. All the circumstances of the case are persuasive to show further, that he was at all times a ready and pliant instrument in her hands. Both Owen and the woman are shown to have encouraged Mathews in his habit of drunkenness, until by excessive indulgence in strong drink he was soon brought to his grave.

The testimony of the witnesses is given in great detail, the history of the alleged transaction covering more than nine hundred pages of a voluminous record, but the facts need not be further discussed for the purposes of this decision.

After stating the circumstances under which the deed was signed, the complainant avers, on information and belief, in substance, that the deed never was in fact delivered, and was, for this reason, inoperative to convey the land; but that, if she is mistaken in this, and the deed was delivered, it was not delivered until several months after it was signed, and that its delivery was procured by the fraud and undue influence by which Joel E. Mathews, Jr., was induced to sign it. It is also averred that the defendant, Mary A. Shipman, was in possession of the lands, holding them and claiming title thereto under said deed. The defendant demurred to the bill on the ground, that the complainant had an adequate and complete remedy at law. At the hearing a motion was also made to dismiss the bill for want of equity. The chancellor overruled both the demurrer and the motion to dismiss, and caused a decree to be entered granting the complainant the relief prayed, basing his decree upon the conclusion reached by him, that the facts charged and proved established a case of undue influence.

The demurrer was, in our opinion, properly overruled. If the execution of the deed was procured by undue influence, it is clear that it would be voidable, and not absolutely void. In such case, she could not maintain an action of ejectment for the recovery of the lands; and being without remedy at law, she may, under the averments in the bill in this cause, come into a court of equity to have the deed cancelled as a cloud on her title, notwithstanding the fact that she is out of possession. It

[Shipman v. Furniss.]

is true, that the jurisdiction of a court of equity can not be invoked, when the sole ground of equitable interference is the removal of a cloud from the title, unless the complainant is, at the time, in possession.—*Arnett v. Bailey*, 60 Ala. 435. But the rule is different when other distinct grounds of jurisdiction are averred. In such case, a court of equity, having assumed jurisdiction for any one purpose, will retain it, that the whole litigation may be settled, and complete justice be done between the parties.—1 Story's Eq. Jur. §§ 228–9; *Lockett v. Hurt*, 57 Ala 198; *Ray v. Womble*, 56 Ala. 32.

There is no objectionable repugnancy in the two aspects presented by the bill, touching the execution and delivery of the deed. In either aspect, whether it was in fact delivered, or whether it was merely signed and not delivered, but surreptitiously obtained from the papers of Joel E. Mathews, Jr., after his death, or from him while living—the deed having been recorded, and being in the hands of the defendant, Mary A. Shipman, who was in possession, claiming title under it—it would be a cloud upon complainant's title; and in either aspect, if the signature or delivery was procured by undue influence exercised by the defendant over the grantor, the relief to which the complainant would be entitled, is precisely the same.—*Mico v. Ashurst*, 55 Ala. 607; *Rapier v. Gulf City Paper Co.*, ante, p. 476.

The majority of the court, however, without committing themselves to all that is said above, hold, that the statements of the bill do not bring this case within the principle declared in cases of alternative or disjunctive averments. According to their opinion, the bill contains two distinct, independent grounds on which the claim to relief is based; and that if either ground is sufficient, its force is not impaired by the fact that it is joined cumulatively with another alleged ground, which, of itself, will not maintain the equity of the bill. They concur in the conclusion reached, that the demurrer to the bill, and the motion to dismiss for want of equity were properly overruled.

The main question in this case, and upon which its decision must depend, is the doctrine of *undue influence* as affected by *unlawful* and illicit relations existing between the donor and donee at the time of executing the deed of gift in question. The jurisdiction exercised by courts of chancery in setting aside voluntary donations or other contracts, in the case of parties bearing confidential relations towards each other, is a familiar and salutary one, and is based upon well recognized principles of a sound public policy.—3 Lead. Cases, Eq. (H. & W.), 111. And while in *Dent v. Bennett*, 4 Myl. & Cr. 269, Lord COTTENHAM declined to make any enumeration of the particular class of persons whose mutual dealings in this regard



[Shipman v. Furniss.]

ought to be watched with jealousy by the courts, it seems now settled that the rule is not confined to relations strictly fiduciary, but applies to "all the variety of relations in which dominion may be exercised by one person over another."—*Huquenin v. Basley*, 14 Vesey, 273, S. C. Lead. Cases, Eq., (H. & W.), p. 111, (462, 486); *Bayliss v. Williams*, 6 Cold. (Tenn.) 440; Kerr on Fraud and Mistake, 192–193; Bigelow on Fraud, p. 279, § 21.

It has been frequently, and, as we think, most properly, exercised in the case of illicit relationships existing between donors and donees, and even testators and devisees, especially where they originated in an abortive attempt at a lawful marriage. For such a relationship, especially if continued under the outward conventionalities of lawful marriage, would manifestly be of a confidential nature.

It is true that, as between a lawful husband and wife, the better opinion is, that a liberal donation by the one to the other will not warrant of itself a presumption of undue influence, unless there is something suspicious in the circumstances, or the nature or magnitude of the gift is such that it ought not to have been accepted.—*Small v. Small*, 4 Me. 220; 3 Lead. Cas., Eq. 144. And it may be further admitted, that, in the case of benefits received under *wills*, the bare proof of an unlawful cohabitation between the testator and a devisee would not alone ordinarily raise a presumption of undue influence, sufficient to avoid the will.—*Wainwright's Appeal*, 89 Penn. St. 220. In *Farr v. Thompson*, Cheve's Rep. (S. C.) 37, the same rule was announced as applicable to a case where a testator bequeathed all of his property to a kept mistress, to the exclusion of his nephew and other relations; but the decision is criticised and its authority doubted by the annotator of the Leading Cases in Equity, 3d vol., p. 146.

There can, however, be no question about the fact that the same rule does not apply with equal force to benefactions received under *wills* and *deeds of gift*, but that there exists a well grounded distinction between the two classes of instruments. Stronger proof is, and manifestly should be required to raise a presumption of undue influence in the case of a will, than of a deed or contract, for the former, unlike the latter, can never take effect until the giver is dead, and, therefore, in a condition utterly incapacitating his further enjoyment or use of the subject of his testamentary disposition. Improper influence may be often inferred to have operated in producing *gifts*, where the same evidence would fail to authorize such an inference in case of a legacy or devise. Lord ELDON declared in *Gibson v. Jeyes*, 6 Ves. 266, that "whenever a person obtains by voluntary donation a large pecuniary benefit from another,

[Shipman v. Furniss.]

the burden of proving that the transaction is righteous falls on the person taking the benefit," and it has always been held that the improvidence of the transaction, generally in the case of both gifts and contracts, is a cogent circumstance showing fraud or undue influence.—*Harvey v. Mount*, 8 Beav. 439; *Cooley on Torts*, 515–16; *Clarke v. Sawyer*, 3 Sandford Ch. 351, 425; *Jennings v. McConnel*, 17 Ill. 148; 3 Lead. Eq. Cases, 141, 145; *Daniel v. Hill*, 52 Ala. 430.

What constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. But it is evident that its exercise may be inferred in all cases of confidential, or *quasi* confidential relationship, where the power of the person receiving a gift or other like benefit, has been so exerted upon the mind of the donor, as, by improper arts or circumvention, to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion.—*Bigelow on Fraud*, 283; 1 Redf. on Wills, 530.

The following principle, we think, is sound both in law and morals, and, though a departure from the former rule, is sustained by the more modern authorities: When one, living in *illicit sexual relations* with another, makes a *large gift* of his property to the latter, especially in cases where the donor *excludes natural objects of his bounty*, the transaction will be viewed with such suspicion by a court of equity, *as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence*. How much further the principle may be extended, if any, it is neither our province nor purpose now to consider.

This doctrine is fully sustained by Judge Cooley in his work on Torts, and receives the approval of other eminent jurists and text writers.—*Cooley on Torts*, p. 515; *Bigelow on Fraud*, p. 271; 1 Redf. on Wills, p. 532–4; 3 Lead. Cases, Eq. 146.

The Supreme Court of Iowa also gave it an unqualified approval in *Leighton v. Orr*, 44 Iowa, 679, and again re-affirmed it in *Hanna v. Wilcox*, 53 Iowa, 547. These cases hold the doctrine that influence obtained by a woman over a man, with whom she is living in unlawful cohabitation, is *undue influence*, and where he makes a conveyance of valuable property to her during its continuance, on the recital of a merely good consideration, a court of equity will intervene to set it aside on the ground of having been procured by undue influence, in the absence of evidence showing it to be fair and free from fraud. In the latter case the court say: "The exercise of unlawful

[Shipman v. Furniss.]

influence will be presumed, when the parties to a deed live in adulterous relations, in the absence of proof of a lawful consideration. These rules are in accord with sound reason and legal principles. Their application will tend to restrain immorality. No paramour should be permitted to enjoy the wages of her sin, which she obtains through the generosity of her victim, stimulated by her ministry to his passions."—*Hanna v. Wilcox, supra*, 550.

In *Dean v. Negley*, 41 Penn. St. 312, the same principle was applied to a devise by a testator under a will, so far as to hold, that, upon an issue to determine the validity of a will, where it was shown by the contestants that the testator was living in open adultery with a woman to whose children he devised the bulk of his estate, these facts would afford a strong presumption of the exercise of undue influence upon the mind of the testator, and would authorize a verdict against the will. This case seems, however, not to have been followed to its full extent in the later case of *Wainwright's Appeal*, 89 Penn. St. 220.

In *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282, the Supreme Court of Tennessee followed the doctrine announced in *Dean v. Negley, supra*, and set aside a deed of gift, executed by a man living in adulterous relations with the donee, by which he conveyed to her a large part of his property in consideration of love and affection. The court say: "We think in such case, there does arise a strong presumption that the deed was obtained by an undue influence and power the woman had obtained over him" [the donor], and for this reason the court set aside the deed.

The Supreme Court of Indiana, in *Kessinger v. Kessinger*, 37 Ind. 341, held, that an influence in procuring the execution of a will might well be considered illegitimate and undue, when exercised by a woman living on terms of illicit intimacy with the testator, which would be regarded as lawful and proper when exercised by a wife.

The principle under discussion seems to have been carried still further in a recent and well considered English case, that of *Coulson v. Allison*, 2 De Gex, Fisher and Jones' Rep. 521. Here a widower had consummated a marriage with the sister of his deceased wife, which, under existing laws, was illegal and absolutely null and void. It was represented to her as a matter of doubt, whether her marriage was valid or not, and during the illicit relationship she made a settlement upon the reputed husband of a considerable part of her estate. On bill filed to set aside the conveyance, it was held by the Lord Chancellor, that, under the facts, the *onus* was on the donee of showing that at the time the woman entered into the transaction, she was fully, fairly, and truly informed of its character, and of



[Shipman v. Furniss.]

her legal *status*; and further, that such a marriage and cohabitation was not a sufficient consideration to support the conveyance, which was executed by the woman in the capacity of wife, and purported to be a post-nuptial settlement. The court ordered the deed to be delivered up and cancelled without proof of any threats, pressure or solicitation having been brought to bear on the mind of the donor. It was said by the Lord Chancellor:

“The moving consideration of the deed was clearly the notion of a valid existing marriage. This is shown by the wording of the deed, every syllable of which proceeds upon the footing of a supposed subsisting marriage, and it is further shown by her executing it, and acknowledging it in the character of a married woman. But, supposing even both Nicholson and Ann Welbank [the donor and donee] to have been aware of the true state of the law, and to have nevertheless agreed to cohabit together, she being the mistress and not his wife, it seems to me the deed would then have been impeachable on the ground of immorality, for nothing can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives.”

The principles above discussed apply with great force to the case under consideration. Here is a deed of gift made by a young man diseased with a consuming passion for strong drink and lewd dissipation, the excessive indulgence in which is shown to have impaired both his mind and body. It sweeps away by a stroke of his pen, all of his property, including the very roof sheltering his head. The beneficiary is a common prostitute, who is preferred to the exclusion of the donor's own blood relations. And the harsh influence of a bad and daring man—a rival paramour—is artfully made subservient to the accomplishment of her purposes. Such transactions not only challenge the duty of the courts to watchfulness and jealousy in scanning the appliances by which they have been procured, but are persuasive to impress the judicial mind with a conviction that the will, and reason, and judgment of the donor were brought under illegitimate constraint in producing so unnatural a result. The chancellor so found by his decree, and we do not feel authorized under the evidence to reverse his finding.

There is another view of this case not considered by the chancellor, which, we think, would compel an affirmance of his decree. The deed of gift, made by Joel Mathews, and which is here assailed, was executed by him either with an honest belief that his marriage was *lawful* and valid, or else that it was *unlawful* and adulterous. If the *first* supposition be true, the

[Shipman v. Furniss.]

deed was executed upon the false and fraudulent hypothesis that the donee was his lawful wife, and could, for this reason, be avoided as having been procured by artifice, circumvention and fraud.—*Coulson v. Allison*, 2 De. G., F. & J., Eng. Ch. 521. If the other supposition be true, the donor being aware of his illicit relationship to Mrs. Shipman, the conveyance must be construed, under all the facts of the case, to have been made in contemplation of the *continuance* between the parties of their adulterous intercourse, and this would present the case of an executed contract upon an illegal consideration. And against such a contract a court of equity will often undertake to grant relief, where, by undue influence, the donee has procured its execution; for in such cases there is no room for the maxim: “*In pari delicto, potior est conditio defendentis.*” *Coulson v. Allison*, *supra*. This maxim, as has been well said, ceases to apply, where “the acts of one of the parties have their origin in the acts or influence of the other, because the wrong then rests chiefly, if not solely, on the person by whom it was contrived; and his confederate will be regarded as a mere tool or instrument for accomplishing an end which was really not his own.”—3 Lead. Cases Eq. 153; *Ford v. Harrington*, 16 N. Y. 285; *Long v. Long*, 9 Md. 348.

It may be that the views announced in this case constitute a slight modification of the doctrine of undue influence as anciently held by the earliest authorities. But the instances are numerous and familiar, where the common law principles have undergone like modifications, adapting themselves, by force of their elasticity, at one time, to the exactions of a sounder reason, and, at another time, to the demands of a more exalted morality. We recall notably the law of uncommunicated threats, equitable estoppels, duress by menaces of property, and the testimony of husband and wife for and against each other. In each of these cases the law has gradually undergone a wise and most commendable mutation.

It is the duty of the courts, we think, to encourage those doctrines and currents of decisions which are supported by a sound public policy, as far as authority and reason will permit. It was the boast of Sir EDWARD COKE concerning the common law, as it before had been of CICERO regarding the Roman law, “that it was the perfection of reason.” It will challenge claim to a yet higher and worthier admiration, when it becomes also the perfection of true honesty, and high christian morality.

Under the provisions of the civil law the conveyance in this case would be void, and it would be a scandal on justice, if a court of conscience, applying the principles of the common law, should permit it to stand.

The decree of the chancellor, overruling the demurrer and granting the relief prayed in the bill, is hereby affirmed.

[Savage v. Wolfe.]

## Savage v. Wolfe.

### *Petition to Probate Judge to Contest Election held under Local Option Law for Calhoun and other Counties.*

1. *Election under local option law ; contest thereof.*—The local option law of Calhoun and other counties, approved March 19th, 1875 (Pamph. Acts, 1874-5, p. 276), containing no provision for contesting elections held thereunder, if there be irregularities in such elections, not apparent on the face of the proceedings or return, statutory contest is not the mode of inquiring into, or correcting them.

2. *Same ; purely statutory.*—The authority for holding such elections is purely statutory, and outside of the general jurisdiction of any court ; and to set such proceedings in motion, there must be presented to the judge of probate of the proper county the sworn petition of some resident freeholder of the limits, within which prohibition is sought to be established, which must contain every material averment specified in the first section of the act.

3. *Same ; application to revoke order establishing prohibition.*—While this act provides that, after prohibition has been established, a second election may be applied for and ordered at the instance, and on the petition “of any freeholder within such limits [who] desires to have the order revoked,” there is an express limitation on the right to make this second application, the statute providing that it can only be made “after the expiration of twelve months after the prior election ;” and a petition seeking a revocation of the order establishing prohibition, which shows on its face that it was filed within twelve months after the first election, is wanting in a material jurisdictional averment, fails to put the statutory jurisdiction of the judge of probate into exercise, and the proceedings based thereon are *coram non jndice*, and void.

4. *Same ; when proceedings for an election thereunder should be quashed.* Where a second election was held under the act to revoke the order establishing prohibition, based on a petition which shows on its face that it was filed within twelve months after the first election, the judge of probate should have quashed the proceedings, on the petition or remonstrance of a freeholder of the territory within which the prohibition was established, averring that “the order authorizing said election was granted before the time allowed by law ;” and on appeal from a judgment rendered by him dismissing such petition or remonstrance, this court will reverse the judgment, dismiss the petition for the second election, and quash the proceedings thereon.

APPEAL from Calhoun Probate Court.

Tried before Hon. A. WOODS.

On the 19th of January, 1880, an election was held in beat 9, in Calhoun county, under the provisions of an act of the General Assembly, authorizing probate judges in Calhoun and other counties therein named, “to order elections in certain cases, to prevent the sale or giving, or other disposition of vinous or



[Savage v. Wolfe.]

spirituous liquors within certain limits in such counties," approved March 19th, 1875 (Pamph. Acts, 1874-5, p. 276), which resulted in an order establishing prohibition, under the act, in said beat. On the 10th of January, 1881, J. A. Wolfe, "a citizen of said county and State, and a freeholder and householder residing in said county, in beat 9," filed with the judge of probate of said county his petition, seeking, under the provisions of section 11 of said act, to have an election ordered for the purpose of revoking the former order establishing prohibition; and under an order made on this petition, an election was held on the 25th of January, 1881, in said beat, resulting in a majority of votes, as shown by the returns, in favor of a revocation of the order establishing prohibition. On the 26th of January, 1881, the day on which the returns were made, James H. Savage filed with the probate judge of said county "his statement contesting said election," and thereupon the court appointed the 11th of February, 1881, as the day "upon which to hear and determine said contest," and further ordered that "the confirmation of said election be and is hereby suspended until said contest is decided." One of the grounds set forth in the "contest" is, that "the order authorizing said election was granted before the time allowed by law." On the hearing the court entered an order dismissing the "contest," on the motion of the appellee; and that order is here assigned as error.

J. M. FALKNER, and J. H. SAVAGE, for appellant.

WALDEN & SON, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The statute, which may be styled the local option law for Calhoun and other counties, approved, March 19, 1875—Pamph. Acts, 276—contains no provision for contesting elections held under it, in the form usually known as contesting elections. If there be any method by which alleged illegal voting, false count, etc., in such elections can be re-examined, it is not by statutory contest. —*Echols v. The State, ex rel. Dunbar*, 56 Ala. 131. If the proceedings be so connected as to give to the probate judge jurisdiction to order an election and to appoint managers to conduct it, then the election may be advertised and held; and if the result of the voting be properly certified and returned to the probate judge, then, if a majority of the electors voting at such election voted in favor of prohibition, and the returns show such to be the fact, it becomes the duty of the probate judge "to make an order on the minutes of said court prohibiting the sale or giving away of vinous or

[Savage v. Wolfe.]

spirituous liquors within the limits mentioned in said petition." If the certified result shows a majority against prohibition, then the application must be dismissed at the cost of the applicant. If there be irregularities not apparent on the face of the proceedings or return, statutory contest is not the mode of raising such questions. The qualifications of the electors, and the general rules for conducting the election, are the same as those which obtain in the general elections, and the managers should conform to the regulations governing general elections.

The authority, however, for holding elections, such as we are considering, is purely statutory, and outside of the general jurisdiction of any court. To set such proceedings in motion, there must be presented to the judge of probate of the proper county the sworn petition of some resident freeholder of the limits, within which prohibition is sought to be established. The petition must contain every material averment specified in the first section of the act, including the averment that the petitioner is a freeholder residing within the proposed limits, and that in the opinion of the petitioner the public good will be promoted by a prohibition of the sale or giving away of vinous or spirituous liquors within such limits. Until such petition is filed, containing proper averments, the judge of probate is without jurisdiction to order an election.

After prohibition has been thus established, a second election may be applied for and ordered, at the instance and on the petition "of any citizen being a freeholder within such limits, [who] desires to have the order revoked." In such case this becomes a jurisdictional averment, and takes the place of the averment in the first petition, "that in the opinion of the petitioner the public good will be promoted by a prohibition," etc. In all other respects the second petition must conform to what is required in the first. But there is a limitation on this right to make this second application. It can only be "after the expiration of twelve months after the prior election." Such is the express language of the statute.

The petition for revocation in this case was sworn to and filed, January 10th, 1881. It shows on its face that the first election which resulted in prohibition, was held, January 19th, 1880; nine days less than twelve months before the second petition was filed. This appears on the face of the petition, and is fatal to it. It failed in this important jurisdictional averment, and failed to put this statutory jurisdiction of the judge of probate into exercise. The whole proceeding, therefore, was *coram non judice* and void.—*Tyson v. Brown*, 64 Ala. 244.

What is the effect of the principles stated above? The petition or remonstrance filed by Savage, while ineffectual as a statutory contest, contains this averment: "6th. The order au-

[Crenshaw v. Carpenter, Ex'r.]

thorizing said election was granted before the time allowed by law." This is true, and should have been treated as an opposition to the entry by the probate judge of an order of revocation. He should have quashed the proceedings. And, proceeding to render the judgment he should have rendered, it is ordered and decreed that his judgment be reversed, and a decree here rendered, dismissing the petition and quashing the proceedings. Let the appellee and his sureties pay the costs of the original proceeding in the court below, and himself pay the costs of appeal both in this court and the court below.

## Crenshaw v. Carpenter, Ex'r.

### *Bill in Equity for Dower.*

1. *Right of widow to dissent from will of deceased husband strictly personal.*—The statute authorizing the widow to dissent from the will of her deceased husband, and in lieu of the provisions thereby made for her, to take her dower in his lands, and her distributive share in his personal estate (Code, § 2293), confers on the widow a strictly personal right, which can not be exercised by another.

2. *Right to dissent can not be exercised for insane widow by next friend.* A widow who is insane, is mentally incapable of entering such dissent; and a dissent entered for her by another, as her next friend, is without authority of law, and invalid.

3. *Same; whether chancery court has power to exercise the right for her—quære.*—Whether the chancery court, on a bill filed within proper time, has the power to dissent, on behalf of a widow who is insane, from the will of her deceased husband,—*quære*.

APPEAL from Greene Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed on 26th January, 1881, by Amanda Crenshaw, suing by her next friend, against John N. Carpenter, as the executor of the last will and testament of Willis Crenshaw, deceased, and others, seeking to have dower allotted to her in the lands of which said testator, who was her husband, died seized and possessed, in 1862, and which were afterwards sold by the executor for the payment of debts. It is shown by the bill that the complainant was, at the time of her husband's death, and has been continuously since that time, a lunatic, confined in the insane asylum at Columbia, South Carolina. It also averred that, on the 15th May, 1866, she, by her next friend, filed in writing in the Probate Court of Greene county, in which the will was admitted to probate, her dissent



[Crenshaw v. Carpenter, Ex'r.]

from the will of her deceased husband, she electing to take dower and her distributive share in his estate, in lieu of the provision made for her in the will. The defendants demurred to the bill on the ground, in substance, among others, that the bill does not show such a dissent from her husband's will as is required by the statute. The chancellor caused a decree to be entered sustaining the demurrer, and that decree is here assigned as error.

J. B. HEAD, for appellant.--(1). Courts of equity have peculiar and special jurisdiction and care of infants and insane persons, and will not only act for them, but, in many cases, will consider that to have been done, which their interest demanded should be done. This is peculiarly so, when questions involving an election between inconsistent rights arise. Dissent by the widow from her husband's will is strictly of this class. See *McLeod v. McDaniel*, 6 Ala. 242; *Addison v. Bowie*, 2 Bland Ch. (Md.) 606; *Goodwyn v. Goodwyn*, 1 Ves. Sr. 226; Story's Eq. § 1098; 1 Leading Eq. Cases, 303; 2 Ves. Jr. 560; 3 *Ib.* 386; 9 *Ib.* 350; *Morrow v. Morrow*, 3 Tenn. Ch. 532. (2). The dissent filed by Mrs. Crenshaw, by her next friend, was a compliance with the law. It is not denied that it was filed in time. See Ordinance of Convention, Rev. Code, p. 63. The filing of a dissent is a *suit*. It is the preliminary step to, and forms a part, an indispensable part, of a suit for dower and her distributive share, where there is a will making provision for the widow.—2 Bouv. p. 567–8. § 2292 of the Code comprehends *all widows*, whether *sui juris* or not. The right to dissent and sue for dower is conferred upon an insane, as well as a sane widow. The dissent of an insane widow, being a suit, may and must be made by her next friend.—Code of 1876, §§ 2894–5 and 3756. This court has declared that rights purely personal in their nature may be enforced by persons *non sui juris*. See *Campbell v. Campbell*, 39 Ala. 312; *Blackman v. Davis*, 42 Ala. 184.

WM. P. WEBB, *contra*.—The right of the widow to dissent from the will of her deceased husband, is personal, and can not be exercised for her by another person. The statute contains no exceptions in favor of insane widows; and, therefore, insanity is no excuse for a failure to file the dissent in person, and in the time and mode prescribed by the statute.—2 Scribner on Dower, p. 469 and cases cited; *Collins v. Carman*, 5 Md. 503; *Shaw v. Shaw*, 2 Dana (Ky.), 341; *Lewis v. Lewis*, 7 Ir. Law (N. C.), 72; *Hinton v. Hinton*, 6 *Ib.* 224; 42 Ala. 29 and cases cited.

SOMERVILLE, J.—The widow of a deceased husband is

[Crenshaw v. Carpenter, Ex'r.]

authorized by our statutes, in all cases, to dissent from his will, and, in lieu of the provision made for her by such will, to take her dower in the lands, and such portion of the personal estate as she would have been entitled to in case of the husband's intestacy.—Code, 1876, § 2292. "Such dissent must be made in writing, and deposited *within one year* from the probate of the will with the judge of probate of the county in which the will is probated, and an entry made of record specifying the day on which the dissent was made.—Code, § 2293.

The question presented by the record is, whether the court can create a saving or exception in the statute, in favor of an insane widow, confined in a lunatic asylum of a distant State, where the legislature has failed to make such exception.

Whatever may be said favorable to the justice and humanity of such a provision, the rules of sound construction and the weight of authority are both opposed to the affirmative of the proposition. The subject is fully discussed in Scribner on Dower, and the following principle is deduced as the result of the adjudged cases:

"Except where otherwise provided by law, the statutory right of election conferred upon the widow in cases of the character now under consideration, is regarded as a strictly personal right, and can not be exercised by another person in her behalf.

"In the application of this rule, it has been held, that the incapacity of the widow to elect by reason of *insanity*, furnishes no sufficient cause for its relaxation."—2 Scribner on Dower, 469, 471.

The language of the statute, as observed by the Supreme Court of Maryland in a similar case, "is comprehensive enough to include every widow, whether sane or insane, and the act [statute] having no exception in favor of the latter, the courts can make none, whether they be courts of law or equity. . . . Where the law directs an act to be done, or a condition to be performed for the purpose of conferring a right, that right can not be acquired if the act is left undone, or the condition is not performed."—*Collins v. Carman*, 5 Md. 503.

In *Lewis v. Lewis*, 7 Ired. (Law), 72, a testator died making no provision by his will for his wife who was a lunatic, and it was decided that the committee having charge of her had no authority by law to enter a dissent in her behalf, and she could not by reason of her want of reason dissent herself. So, in *Hinton, v. Hinton*, 6 Ired. (Law) 274, it was held, that a widow could not renounce her husband's will by attorney, in view of the statutory requirement that she must do so in "open court."

That the right of dissent in such cases is a personal one, capable of being exercised only by one possessing the requisite reason and judgment, seems fully sustained by authority.—2

[Wimbish v. Montgomery Mutual Building & Loan Association.]

Scribner on Dower, 471; 2 Redf. on Wills, 367; *Donald v. Portis*, 42 Ala. 29; *Welch v. Anderson*, 28 Mo. 293. The legislature nowhere expressly confers on the courts the power to make such election for her in case of her disability to do so, but seems to have remitted the misfortunes of her condition to the presumed humanity of her husband, whose highest duty is to provide for her in a manner commensurate with her wants and his own financial ability.

And the courts possess just as little power to create a saving or exception, taking *insane* persons out of the operation of the statute. It is enough to say, that the General Assembly has made no such exception and we have no such power. The fact that lunatics are excepted from the operation of the statute of limitations in certain cases, and to a certain extent, is persuasive of the view that the failure to make a like exception here is not entirely unmeaning.—Code, 1876, § 3236; *Demarest v. Wynkoop*, 3 John. Ch. Rep. 138; *Collins v. Carman*, 5 Md. 503, 517; *Yniestra v. Tarleton*, 67 Ala. 128.

The will of the deceased husband, in this case, was probated in September, 1862. At the time of his death the widow was insane, and has continued to be so ever since. Her condition, mental and physical, was such that she was incapable of entering such a dissent from the will as the statute requires, and no one is authorized by law to act in her behalf. The chancellor so ruled, in effect, by sustaining the demurrer and dismissing the bill, and we see no error in his rulings. If the case be one strongly appealing for a remedy, it must be afforded by the legislative department, as has been done in many of our sister States. The courts are powerless to enact laws. They can only enforce them as they are already enacted.

Whether the Chancery Court, on a bill filed within proper time, possesses the power to make an election for an insane widow in cases like this, we do not now decide.

## **Wimbish v. The Montgomery Mutual Building and Loan Association.**

*Bill in Equity to enjoin Sale under Power in Mortgage, and to have Mortgage declared Void.*

1. Under contract for the purchase of lands, the vendee is the equitable owner.—When a valid contract for the purchase of lands has been made, the vendor covenanting to make title on the payment of the purchase-



[Wimbish v. Montgomery Mutual Building & Loan Association.]

money at a future day, a court of equity, acting on its maxim of treating that as done, which the parties contemplate shall be done in the final execution and consummation of the contract, regards, for most purposes, the contract as specifically executed, and considers the vendor the owner of the purchase-money, and the vendee as the equitable owner of the land, attaching to the land a trust in favor of the vendee, which not only binds the land while the legal estate remains in the vendor, but which also binds every one claiming under him, except a *bona fide* purchaser without notice.

2. *At common law, wife had capacity to take from husband through purchase by him in her name.*—At common law, the wife had full capacity to take from the husband through a purchase made by him in her name. By such a purchase the maxim of the common law that husband and wife, because of their legal unity, could not contract with each other, and of consequence, that the husband could not directly convey to the wife property, real or personal, was not offended, because of the intervention of a third person as the grantor or donor, through and from whose conveyance, the estate or interest was derived, and by which the property was vested in the wife.

3. *When a court of equity will enforce the interest of a cestui que trust growing out of a voluntary agreement.*—While a court of equity will not, as a general rule, aid a mere volunteer in the enforcement of an executory agreement, nor upon such an agreement, unsupported by a valuable consideration, will create a trust, and establish the relation of trustee and *cestui que trust*; yet, if the trust is actually created, is effectually constituted, it is irrevocable, and a court of equity will enforce the equitable interest of the *cestui que trust*.

4. *Validity of contract not affected by fact that consideration moves from one, while its promises and obligations are made to another.*—The validity of a contract is not affected, because the consideration may not have moved from the party to whom the obligations of the contract are extended, and in whom the right of enforcement resides. It is not uncommon, that the consideration for a contract moves from one person, while its promises and obligations are made to another, and the validity of such contracts, when accepted by the party to whom the promise or obligation is made, can not be questioned.

5. *When a party is a mala fide purchaser.*—The settled doctrine of a court of equity is, “that the person who purchased an estate (although for a valuable consideration), after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.”

6. *Purchase of real estate by husband in the wife's name; interest therein.*—If on the purchase of land by the husband, he take a bond for title in the wife's name, whereby the vendor covenants on payment of the purchase-money at a future day, to make title to her, she is thereby invested with an equity in the land, which is irrevocable and indestructible by any subsequent act of the husband, and which, on payment of the purchase-money, becomes perfect and entitles her to a conveyance of the legal title. And if, on payment of the purchase-money by the husband, though with his own funds, he deliver up the bond for title, and at his request, but without the wife's knowledge or assent, the vendor convey the legal estate to a third party, who, in turn, conveys it to another in mortgage to secure a loan then made, nominally to the mortgagor, but, in fact, for the use and benefit of the husband, all parties having full notice of the wife's equity, such mortgagee, although a purchaser for a valuable consideration, takes the legal title *mala fide*, and will not be allowed thereby to defeat the wife's prior equitable estate.

7. *Statutory separate estate of the wife.*—Where the husband purchased

[Wimbish v. Montgomery Mutual Building & Loan Association.]

real estate and took bond for title in his wife's name, whereby the vendor covenanted to convey to her the legal title on payment of the purchase-money, the equity of the wife arising from such covenant is her statutory separate estate.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

On the 21st July, 1873, Eveline T. Wimbish, a married woman, by her next friend, filed the bill in this cause against Miles M. Wimbish, her husband, and Henry C. Moses, M. P. LeGrand and the Montgomery Mutual Building and Loan Association, a body corporate under the laws of this State. The purpose of the bill is to have delivered up and cancelled a deed executed by LeGrand to Moses conveying a lot of land in the city of Montgomery, which complainant's husband had, prior to the execution of said deed, purchased from LeGrand in her name, taking bond for title, whereby LeGrand covenanted to convey to her the lot upon the payment of the purchase-money therefor, and to compel LeGrand to convey to her said lot according to the terms of the bond for title; to perpetually enjoin the Montgomery Mutual Building and Loan Association from selling said lot under a power of sale contained in a mortgage executed by Moses to the association, and from taking any steps looking to the foreclosure thereof, and to have said mortgage declared void as against the complainant. The material facts alleged in the bill and shown by the evidence are stated in the opinion. On the final hearing, had upon the pleadings and proof, the chancellor was of the opinion that the complainant was not entitled to relief, and caused a decree to be entered dissolving an injunction which had been issued upon the filing of the bill, and dismissing the bill; and this decree is here assigned as error.

WATTS & SONS, D. S. TROY and T. M. ARRINGTON, for appellant

CLOPTON, HERBERT & CHAMBERS, *contra*.

BRICKELL, C. J.—We do not deem it necessary to consider any of the questions of fact which are matter of fair controversy. The rights of the parties seem capable of solution and determination upon facts in reference to which there is no real conflict in the evidence. These facts are, that in 1871, the husband of the appellant contracted with one LeGrand, who was seized in fee of the premises in controversy, for the purchase of the premises at the price of twelve hundred and fifty dollars, payable in two equal installments, at (most probably) three

[Wimbish v. Montgomery Mutual Building & Loan Association.]

and six months from the day of the purchase. For these installments the husband made his promissory notes payable to LeGrand, who executed a bond by which he covenanted that on the payment of the notes, he would make to the appellant a title to the premises in fee simple. The notes were paid by the husband at or about the time the last one fell due; and soon thereafter, at the request of the husband, LeGrand conveyed the premises to the appellee, Moses, without the knowledge or consent of the appellant, and the bond for title was surrendered to him. Moses conveyed the premises to the Building and Loan Association by mortgage, as it was contemplated he should, by the agreement between him and the husband, when LeGrand executed the conveyance; the purpose of this transaction being to enable the husband to borrow money. Moses and the Building and Loan Association had notice that the covenant of the bond was for the making of title to the appellant, when the conveyance was taken by Moses, and when the mortgage was executed.

The general principle prevailing in a court of equity is, that from the time a valid contract for the purchase of lands is entered into, the vendor, as to the land, becomes a trustee for the vendee, and as to the purchase-money, the vendee becomes a trustee for the vendor. When, as in the present case, the agreement is, in its legal nature, executory, the vendor covenanting to make title on the payment of the purchase-money at a future day, a court of equity, pursuing its own maxim of looking upon, or treating that as done, which ought to have been done, or which the parties contemplate shall be done in the final execution and consummation of the contract, for most purposes, regards the contract as specifically executed. The vendee is the equitable owner of the land—the vendor is the owner of the purchase-money. To the land a trust attaches; of it the vendor is seized for the use of the vendee. The trust binds the land, while the legal estate remains in the vendor; and it binds the heir or devisee succeeding to it, and every one claiming under the vendor, with the exception of a *bona fide* purchaser without notice.—1 Story's Eq. §§ 789–90. As land the vendee may convey or devise it; and as land it is descendible to his heirs, who may in a court of equity compel a specific execution of the contract. If there is not a stipulation to the contrary, the contract of itself operates a transmutation to the vendee of the possession, entitling him to the right of entry and of enjoyment.—*Reid v. Davis*, 4 Ala. 83.

In this relation, with these corresponding rights, LeGrand and Wimbish would have stood, if the penalty of the bond for title had been payable to Wimbish, and the covenants of the bond had been for the making of title to him. Then, if



[Wimbish v. Montgomery Mutual Building & Loan Association.]

he had made sale of the lands, or if he had made an assignment of the bond, the effect of the sale, or of the assignment, would have been a transfer of the equity acquired by the contract of purchase, placing the vendee, or the assignee, in respect to the lands, in the same relation as he was at the time of the sale or assignment—entitling him to resort to a court of equity, if necessary to perfect the title.—*Brown v. Chambers*, 12 Ala. 697. The bond for title, in penalty payable to the appellant, and the covenant being for the making of title to her on the payment of the purchase-money, her rights are at least equal to the rights of a purchaser from, or an assignee of the husband, and are the better protected, because of them, from the bond, LeGrand, the vendor, had full knowledge and notice.

It can not be doubted that at common law, the wife had full capacity to take from the husband through a purchase made by him in her name. The purchase, if induced only by the meritorious consideration of making a provision for the wife—if not founded on a valuable consideration moving from her, or from a third person for her benefit, was presumed to have been intended as a gift and advancement to her, unless evidence of a different intention was adduced.—1 Bright on Hus. and Wife, 32. And it is not important, whether the estate passing to the wife by the purchase, is legal or equitable—an absolute fee, or a mere right in equity.—*Raymond v. Pritchard*, 24 Ind. 318; *Thompson v. Thompson*, 1 Yerger 97. The maxim of the common law that husband and wife, because of their legal unity, could not contract with each other, and of consequence that the husband could not directly convey to the wife property, real or personal, was not offended. There was the intervention of a third person as the grantor or donor, through and from whose conveyance, the estate or interest was derived. This intervention removed any difficulty springing from the legal unity between husband and wife, and the conveyance vested the property in the wife.—1 Bish. Mar. Women, §§ 712-715.

This maxim of the common law was accepted in a court of equity with many qualifications, and in a very limited sense. That court was, and is in the habit of lending its aid for the enforcement of many agreements between husband and wife, which in a court of law would be esteemed void. A voluntary agreement or covenant of the husband, founded on the meritorious consideration of making provision for a wife, as between the parties, the court will aid in enforcing, as if it were founded on a valuable consideration.—1 Leading Cases in Equity, (4th Amer. Ed.) 425; *Minturn v. Seymour*, 4 Johns. Ch. 498; *Denison v. Goehring*, 7 Penn. St. 175. And while the court will not, as a general rule, aid a mere volunteer in the enforcement of an executory agreement, or upon such an agreement, not

[Wimbish v. Montgomery Mutual Building & Loan Association.]

supported by a valuable consideration, will not create a trust and establish the relation of trustee and *cestui que trust*, yet, if the trust is actually created, is effectually constituted, it is irrevocable, and a court of equity will enforce the equitable interest of the *cestui que trust*.—1 Lead. Eq. Cases, 382, *et seq.*; 1 Perry on Trusts, § 96, *et seq.* As to the husband, in the present case, the trust was executed—not executory. No further act or declaration on his part was necessary to invest the wife with the equity in the lands, created by the contract of purchase. In the contemplation of a court of equity, she was seized of the lands, and for her use, and as a trustee, LeGrand had the legal estate, with which he was bound to invest her when the purchase-money was paid. That the purchase-money was payable by the husband, can not change the character of the right and equity of the wife. The validity of a contract is not affected, because the consideration may not have moved from the party to whom the obligations of the contract are extended, and in whom the right of enforcement resides. It is not uncommon, that the consideration for a contract moves from one person, while its promises and obligations are made to another, and the validity of such contracts, when accepted by the party to whom the promise or obligation is made, can not be questioned. Now, assuming that it is not shown by a preponderance of the evidence, that the husband made the purchases of the premises in controversy for the wife, intending to pay for them with moneys, her separate property, in fact merely lending his credit, and did not pay the purchase-money with such moneys, but with his own money, there can be no doubt the wife was invested with the equity in the lands—an equity becoming perfect, when the purchase-money was paid, entitling her to demand a conveyance to herself of the legal estate. The equity was irrevocable and indestructible by any act of the husband subsequent to its creation. If, by any contrivance, the husband had become clothed with the legal estate, he would have been a mere trustee for the wife.—*Thompson v. Thompson*, 1 Yerger, 97; *Raymond v. Pritchard*, 24 Ind. 318. And having the legal estate, all claiming through him with notice of the equities of the wife, would have been subject to these equities, and would have held the legal estate in trust for her. With full notice of the equity of the wife, Moses entered into the transactions with the husband, and accepted from LeGrand a conveyance of the legal estate. Equities would be of little value, and would be disappointed and defeated by mere contrivance, if he were not held a trustee of the estate for the wife. Nor can there be any doubt, that of the equity the Building and Loan Association had full notice when they made the loan nominally to Moses, but, as they knew, really to the husband,

[Renfro's Adm'x v. Hughes.]

and accepted the mortgage from Moses. The settled doctrine of a court of equity is, as announced by Lord HARDWICKE, in *Le Neve v. Le Neve*, (2 Lead. Eq. Cases, 109), "*that the person who purchased an estate (although for a valuable consideration), after notice of a prior equitable right, makes himself a mala fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.*"

The equity of the wife arising from the covenant of LeGrand to make to her a conveyance of the legal estate, is property accruing to her after her marriage, and becomes her statutory separate estate. If to her LeGrand had made the conveyance, without words which would have excluded the common law marital rights of the husband, the covenant of the bond would have been performed, and the legal estate would have been the statutory, not the equitable estate of the wife. A court of equity, for most purposes, treats the covenant as if it had been specifically executed. So regarding it, the estate accrues to the wife as her statutory separate estate.

It results from these views, that the decree of the chancellor is erroneous and must be reversed, and a decree will be here rendered granting the appellant appropriate relief.

STONE, J., not sitting.

## Renfro's Adm'x v. Hughes.

### *Trover.*

1. *Trover; reduction of damages by recovery of property.*—In trover, if the plaintiff regains possession of the property sued for before the trial, this should be estimated in reduction of damages.

2. *Same; measure of damages when property regained.*—In such case, the measure of damages is the actual injury sustained by the plaintiff at the hands of the defendant, including any diminution in the value of the property caused by the defendant's detention or use, the value of the use of the property while detained by the defendant, and all expense the tort of the defendant has put upon the plaintiff in recovering the possession.

3. *Same.*—Where in trover for the recovery of damages for the conversion of a horse, which was stolen from the plaintiff in Georgia and brought to this State by the guilty party and sold to the defendant, who had no knowledge of the theft, the traveling expenses of the plaintiff from his home in Georgia to the place where he found the horse, constitute no part of the injury done by the defendant to the plaintiff, and can not be recovered.



[Renfro's Adm'x v. Hughes.]

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was an action of trover by Samuel E. Hughes against Forney Renfro, for the recovery of damages for the alleged conversion of a horse. Renfro having died pending his appeal in this court, the cause was here revived in the name of his personal representative. On the trial the plaintiff proved that the horse was his property; that it was stolen from him at his home near Milledgeville, in Georgia, and that he afterwards found it in the possession of the defendant at Opelika, in this State, from whom he regained it before the commencement of this suit. The evidence for the defendant tended to show that he traded with one Huguley for the horse about three or four weeks after it was stolen; that he kept it about two weeks and sold it to one Stevens, who in turn sold it to one Adams, from whom defendant re-purchased it after hearing that it had been stolen, for the purpose of returning it to the owner, and that at the time of purchasing the horse from Huguley he had no knowledge or suspicion that it had been stolen. The plaintiff, against the defendant's objection, introduced evidence tending to show the value of the horse when defendant obtained possession of it, and also evidence tending to show the value of the horse at the time it was regained by plaintiff, about one year afterwards, and that on account of its damaged condition it was then worth less than at the time it went into the possession of the defendant; and to the introduction of this evidence the defendant duly excepted. The plaintiff also, against the defendant's objection, introduced evidence tending to show the value of the hire or use of the horse from the time defendant first obtained possession to the time plaintiff regained it, and the defendant excepted. The plaintiff was allowed by the court, against the defendant's objection, to prove that he came from his home to Opelika, for the purpose of regaining the horse, by railroad, and that his railroad fare was sixteen or seventeen dollars. To this ruling the defendant excepted. There was a judgment on verdict for the plaintiff, from which the defendant sued out this appeal.

The rulings of the Circuit Court above noted, together with others not necessary to be set out in this report, are here assigned as error.

J. M. CHILTON, for appellant, cited *Donnell v. Jones*, 13 Ala. 490; *Lewis v. Paull*, 42 Ala. 136; 1 Chitty's Plead. m. p. 339; 2 Add. on Torts, p. 1147; *Deysher v. Triebel*, 64 Penn. St. 383.

BARNES & SON, *contra*.—(1). Trover will lie for a *temporary*  
VOL. LXIX.

[Renfro's Adm'x v. Hughes.]

conversion.—*St. John v. O'Connell*, 7 Port. 479; *Gray v. Crocheron*, 8 Port. 191; *Ewing v. Blount*, 20 Ala. 694. (2). "If the plaintiff has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, and also compensation for any injury done them; and *if he is put to necessary and reasonable expense in regaining the possession* (otherwise than by suit at law), he may recover such expenses from the wrong-doer."—*Ewing v. Blount*, 20 Ala. 694; *McDonald v. North*, 47 Barb. 530; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Pierce v. Benjamin*, 14 Ib. 356; *Tam-raco v. Simpson*, 19 C. B. (N. S.) 453; *Hurlburt v. Green*, 41 Vt. 490; Sedg. on Dam. 613-14.

STONE, J.—In actions of trover, where the possession of the property has not been recovered or regained before the trial and judgment, the measure of damages, if the plaintiff succeed, is the value of the property converted, and interest upon it. And, in assessing the damages, the jury are not necessarily confined to the value at the time of the conversion. When this is the case, the interest should be computed from the time the jury elect in fixing the value. They should never fall below that, but may take any value proved, from the time of the conversion to the trial. But if before the trial the plaintiff regains possession of the property, this should be estimated in reduction of damages. In the case last supposed, the measure of recovery is the actual injury the plaintiff has sustained at the hands of the defendant. This will include any diminution in the value of the property caused by the defendant's detention or use, the value of the use of the property while detained by the defendant, and all expense the tort of the defendant has put upon the plaintiff, in recovering the possession. These principles are clearly settled in *Ewing v. Blount*, 20 Ala. 694, and we approve and follow them. They do not include counsel fees for prosecuting the action in trover.—*Copeland v. Cunningham*, 63 Ala. 394, and authorities cited.

The plaintiff, against the objection of defendant, was allowed to prove, as an item of damages, his railroad fare from Milledgeville, Georgia, to Opelika, Alabama, as an item of expense in recovering his horse. There is no pretense that Renfro had any agency in removing the horse from the one place to the other. The testimony is, that the horse was stolen from the plaintiff at Milledgeville, Georgia, was brought to Opelika by Huguley, and was there traded to Renfro. This is not injury done by defendant to the plaintiff, and furnishes no ground of recovery. The court erred in admitting this evidence.—*Bolling v. Tate*, 65 Ala. 417.

Reversed and remanded.

## Security Loan Association v. Weems.

### *Garnishment.*

1. *Garnishee can not complain of errors in judgment against defendant.* A garnishee can not take advantage of errors or irregularities in the judgment against the defendant, as the debtor of whom he is summoned to answer.

2. *Garnishment; when notice of proceedings in the cause imputed to garnishee.*—A garnishee, having answered, remains before the court for the purpose of receiving its judgment; and notice of an application by the plaintiff for further answer, and of the order granting the application, is imputed to him.

3. *Same; future indebtedness growing out of existing contract; continuance for further answer.*—Where a garnishee, in his answer, admits that he holds in pawn or pledge, as collateral security for debts owing him by the defendant, a number of shares of stock in several corporations belonging to the defendant, he thereby discloses a contract, upon which in the future an indebtedness from the garnishee to the defendant could accrue; and in such case the court may with propriety grant the plaintiff a continuance of the garnishment for further answer.

4. *Same; judgment against garnishee upon subsequent answer.*—Where, in such case, the garnishee subsequently files a further or additional answer, showing that a sale of the stock had been made, and that the proceeds of the sale, in the hands of the garnishee, were more than sufficient to pay the secured debts, an existing indebtedness, springing out of the antecedent contract, is thereby disclosed, which may properly be subjected to the payment of the plaintiff's demand against the defendant.

5. *Same; notice of adverse claim under the statute.*—By the statute authorizing the suggestion by the garnishee of an adverse claim in a third party, etc. (Code of 1876, § 3302), it is not intended that creditors subsequently suing out garnishments shall be suggested as rival claimants and introduced to litigate with the creditor who is first in point of time; and it is not error for the court to refuse to suspend proceedings and cause notices to issue to the parties suing out such subsequent garnishments, on suggestion contained in the garnishee's answer.

### APPEAL from Mobile City Court.

Tried before Hon. O. J. SEMMES.

On the 2d of April, 1880, E. R. Weems commenced suit, by summons and complaint, against B. O. James & Co., founded on an account. In the complaint the defendants are described as "B. O. James and B. O. James & Co.," but the summons runs against "B. O. Neal James." The return of the sheriff is in these words: "Received April 3d, 1880, and on the same day I served a copy of the within complaint and summons on B. O. James, one of the firm of B. O. James & Co." On the day the complaint was filed, the plaintiff sued out a garnish-



[Security Loan Association v. Weems.]

ment against the Security Loan Association, a body corporate, as debtor to B. O. James and B. O. James & Co. On the 1st of July, 1880, the company answered, alleging, in substance, that on the 8th of March, 1880, the defendants, B. O. James & Co., being indebted to them in a stated sum due by promissory note on the 13th of December, 1880, transferred and assigned to the company, as collateral security for said note, certain shares of the capital stock of certain corporations particularly described in the answer; and that on the 18th of March, 1880, the defendant, B. O. Neal James, being also indebted to them in a stated sum due by promissory note on the 13th of December, 1880, transferred and assigned to the company, as collateral security therefor, certain other shares of the capital stock of another corporation, also particularly described in the answer; that these several shares of stock were also transferred to, and stood in the name of the company, on the books of the several corporations, but that it held the same only as security for said notes. On the 8th of July, 1880, a judgment by default was obtained against the defendants, and a writ of inquiry ordered, which was, on the 27th of July, 1880, executed, and a judgment rendered thereon. On the 26th of July, 1880, the garnishment was continued "until the next term for the garnishee to answer further." On the 15th of April, 1881, the garnishee, insisting that it had already made full answer, and that, no objection having been made thereto, and no contest thereof having been filed, it could not be required to make further answer, answered, alleging the sales of the shares of stock which it held as collateral security to the debts owing to it by B. O. James and B. O. James & Co. respectively, and showing a balance of the proceeds of sale in its possession, after paying both debts, and suggesting the service of other garnishments upon it since its former answer, and that the plaintiffs in those suits claim the funds in its possession under their garnishments. By bill of exceptions it is shown that the order of continuance for further answer, above mentioned, was made on the *ex parte* motion of the plaintiff, and in the absence of the garnishee and its counsel.

After filing its second answer, the garnishee moved the court to discharge it upon the answer which it had first made; but the court overruled the motion, and the garnishee excepted. It thereupon moved the court to suspend proceedings against it, and to cause notices to issue to the other creditors of the defendants who had sued out garnishments against it, as shown by its answer, requiring them to appear and contest with the plaintiff their rights to the said money in the garnishee's possession. This motion the court also refused, and the garnishee excepted; and thereupon the court, on motion of the plaintiff,

[Security Loan Association v. Weems.]

rendered judgment against the garnishee on its answer, and it excepted. This judgment and the rulings of the City Court in the garnishment suit above noted, are here assigned as error.

H. PILLANS, for appellant.—(1). The judgment against the garnishee was, in any event, erroneous, because no valid judgment existed against the original defendants, or, at any rate, against the copartnership, B. O. James & Co., as the firm was not served with any summons against B. O. James & Co., and the suit was not commenced by attachment.—*Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 146; *Mathews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Stone v. Harris*, Minor, 32. (2). The writ of garnishment only affected, and fixed the grasp of the court upon, the property, or money in the hands of the garnishee at the time the writ was served, or at the time the answer was made, or any money which would be due by any contract then existing.—Code of 1876, § 3269. The garnishee should have, therefore, been discharged on its first answer, because it had nothing *in specie* which was leviable and which it could be required to surrender.—*Nabring v. Bank*, 58 Ala. 206; Drake on Att. 519–20. (3). The undisputed, unshaken rule is, that only such assets as are leviable on execution, or can be sued for in *indebitatus assumpsit* or debt, can be reached by garnishment.—*Godden v. Pierson*, 42 Ala. 370; *Roby v. Labuzan*, 21 Ala. 60; *Henry v. Murphy*, 54 Ala. 246, and cases cited. (4). On an express promise by the garnishee to pay defendant, *if the amount is uncertain*, the writ is not operative.—*Hall v. Magee & Reid*, 27 Ala. 414–16. Nor was it such an indebtedness in “the future by contract then existing” as could be reached by this process.—Drake on Att. §§ 525–7. (5). A garnishee showing by his answer that he holds but a chose in action, is not liable to judgment thereon.—*Pearce v. Shorter*, 50 Ala. 318–19; *Marston v. Carr*, 16 Ala. 325; *Jones v. Norris*, 2 Ala. 526; Drake on Att. § 425, and note; §§ 426–7, 430–1; 62 Ala. 116; *Lewis v. Dubose*, 29 Ala. 219; *Toomer v. Randolph*, 60 Ala. 360; *Henry v. Murphy*, 54 Ala. 251; *Randolph v. Little*, 62 Ala. 396–99. (6). The whole effort of plaintiff is to fix a legal lien on an equitable demand, which can not be done in this case.—*Roby v. Labuzan*, 21 Ala. 60; *Harrell v. Whitman*, 19 Ala. 135. (7). A garnishee who has answered, remains in court to receive its judgment on his answer, if not contested, but is there for no other purpose. The court can not continue the cause for further answer merely because it appears from his answer *probable* that there will be a future indebtedness.—*Jones v. Howell*, 16 Ala. 697; *Hazard v. Franklin*, 2 Ala. 349–51; *Branch Bank v. Poe*, 1 Ala. 396. (8). The trustee named in the statute concerning garnishment of trustees, is a trustee or

[Security Loan Association v. Weems.]

mortgagee under power of sale or other express trust.—*Price v. Masterson*, 35 Ala. 483.

J. L. & G. L. SMITH, *contra*.—(1). Although the summons may vary from the complaint, and in this respect be irregular, still, having been served with a copy of the complaint as prescribed by the Code, it necessarily gives actual notice to the party served of the cause of action to be defended, and commands him to appear and defend the same.—Code of 1876, §§ 2925, 2926, 2932. A firm may be sued by its firm name, and service in such case upon one member is sufficient.—*Ib.* § 2904. (2). The variance being a mere irregularity, not reaching to the jurisdiction of the court, it can not be taken advantage of by the garnishee.—1 Brick. Dig. p. 182, § 405; 57 Ala. 346. (3). The suggestion in the answer that other parties had sued out garnishments against the garnishee as debtor to the defendants, is not that they claim any “title” or “interest” in the debt shown by the answer. Their claim is simply that the money *still* remains the *property of B. O. James & Co.* Section 3302 of the Code, therefore, has no application.—*Winslow v. Bracken*, 57 Ala. 369. Their only course was to await the termination of the proceedings in this cause.—*Montgomery Gas Light Co. v. Merrick*, 61 Ala. 534. (4). If the first answer was unsatisfactory, it was competent for the plaintiff to ask for one more certain.—*Allen v. Morgan*, 1 Stew. 9. And the court certainly had the authority to enlarge the time within which the garnishment proceedings should be completed.—*Ex parte Opdyke*, 62 Ala. 68. (5). The motion for further answer was made in open court, and no notice to the garnishee was necessary.—*Stein v. Burden*, 30 Ala. 270. (6). The second answer shows such an indebtedness as defendants could have recovered in *indebitatus assumpsit*.—1 Brick. Dig. p. 140. And hence it could be reached by garnishment.—*Ib.* p. 175. (7). The second answer having been properly required, the relations between the debtor and garnishee prior to that answer are immaterial. Prior to the Code of 1852, the garnishee could only be required to answer what he owed at the time the writ was served.—Clay’s Dig. p. 59; *Roby v. Labuzan*, 21 Ala. 63. But this was changed by section 2517 of that Code; and by the statute, as it now is, an indebtedness *at the time of answer* is subjected to the writ.—Code of 1876, § 3269. (8). The title to money and effects in the hands of a trustee, under a valid trust, is not in the debtor; he has only a conditional or contingent interest in them, or in the excess or surplus after the trust is executed, which may become recoverable in an action at law, and which, except for section 3275 of the Code, could not be reached by attachment. The intention and spirit of section



[Security Loan Association v. Weems.]

3275 of the Code was clearly to extend the operation of an attachment so as to enable it to fasten a *lien* upon the money or effects, which should ripen into a right of condemnation as soon as such money and effects, or such excess, became recoverable in an action by the debtor. And there is no reason why the remedy by garnishment, as to choses in action similarly situated, should not be equally extended by the statute. As to the spirit of section 3275, see *Price v. Masterson*, 35 Ala. 483. This view is in conflict with an intimation given in *Nabring v. Bank of Mobile*, 58 Ala. 206; but this question was not then presented. It is not in conflict with *Pearce & Co. v. Shorter Bros.*, 50 Ala. 318; nor with *Jones v. Norris*, 2 Ala. 526; nor with *Marston v. Carr*, 16 Ala. 325; nor with any of the later cases.

BRICKELL, C. J.—1. The judgment rendered against the defendants in the original suit is not void, though the return of the service of the summons may be so defective that on error it would avail to reverse the judgment. A garnishee can not take advantage of errors or irregularities in the judgment against the defendant, as whose debtor he is summoned.—1 Brick. Dig. p. 182, § 405.

2. The appellant, having submitted to answer, remained before the court for the purpose of receiving its judgment. Notice of the application for the order for a further answer, and of the order itself, the regularity of judicial proceedings requires shall be imputed. It was a duty to be present during the term at which the answer was filed until final action was taken by the court. This is a duty devolving upon all suitors, and from which they can be relieved only by the act of the court, or by the act of the adverse party.—1 Brick. Dig. p. 377, § 180.

3. The statute requires a garnishee to answer not only whether he is indebted to the defendant at the service of the garnishment, or at the time of making answer, but also “whether he will not be indebted in future to him by a contract then existing; and whether he has not in his possession, or under his control, personal property, or things in action, belonging to the defendant.”—Code of 1875, §§ 3269 and 3293. It is obvious the scope of a garnishment is greatly enlarged by the statute. Formerly, the garnishment had relation only to its service, subjecting an indebtedness then existing, not extending to such as accrued subsequently, though it was before answer, and resulted from a contract or some relation existing between the parties. Debts existing, not due and payable, could be subjected, and for them a judgment rendered with a stay of execution until maturity. But debts, or demands, which would accrue in the future from existing contracts, could not be

[Security Loan Association v. Weems.]

reached.—1 Brick. Dig. 175, § 318. The insufficiency of the remedy in this respect, it is the purpose of the present statute to cure.

The answer of the appellant disclosed that it held in pawn or pledge, as collateral security for debts owing it by the defendants, a number of shares of stock in several corporations. If there was default by the defendants in making payment of their debts, the appellant had the right to make sale of these stocks. The right was conferred by law—it was an incident to the relation existing between the parties.—5 Wait's Actions and Defenses, 176. When the sale was made, if there remained of its proceeds an excess, after paying the debts for the security of which the stock was pledged, the excess would have been money had and received by the appellant for the use of the defendants in the judgment. There was then at the time of the service of the garnishment, and of the answer, a contract upon which in the future an indebtedness from the appellant to the defendants could accrue. There was propriety, consequently, in the continuance of the garnishment for a further answer. The answer subsequently filed, disclosing that a sale had been made, and that its proceeds, which the garnishee had reserved, were more than sufficient to pay the secured debts, there was an indebtedness then existing, springing out of the antecedent contract which was properly subjected to the payment of the judgment against the defendants. For it the defendants could have maintained debt or *indebitatus assumpsit*, and any demands for which these actions will lie, may be reached by garnishment. How far the appellant could have been charged, as the holder of the stock, and what would have been its liability, are not material questions in the present condition of this case. When the debts were satisfied, the stock could have been seized and sold under execution at law, and we are incline to the opinion, that it was proper that the appellant should have been kept before the court, so that in the event there was payment of the debts, an order could have been made for the surrender and sale of the stock. We do not understand there is anything in the opinion of this court in *Nabring v. Bank of Mobile*, 58 Ala. 204, in conflict with this view. But we forbear a consideration of this question, as it is not, in our opinion, necessary to a decision of this case.

4. At any time before final judgment against him, a garnishee may allege notice to him that a stranger claims title to, or an interest in the debt he admits, or in the property of which he admits possession. The allegation being made, the court is bound to suspend further proceedings against the garnishee, and cause a notice to issue to the claimant to come in and maintain his right.—Code of 1876, § 3302. The purpose of the

[Fitzsimmons, Trustee, v. Howard.]

statute is to afford to the garnishee protection against adverse claims to the property or the debt, derived from the defendant to whom it either belongs or has belonged. It is not intended that creditors subsequently suing out garnishments, which are of necessity and indisputably subordinate to a prior garnishment which has been served, shall be suggested as rival claimants and introduced to litigate with the creditor who is first in point of time. They have no title to, or interest in the property or the debt—at most, they have but a lien, and whether it is superior or inferior to that of the creditor first suing out and obtaining service of garnishment, there are other and more appropriate modes of procedure for determining. The statute contemplates a trial of the ownership of the debt or property—whether it resides in the defendant or the claimant, and not a contest between creditors admitting the ownership of the defendant, who claim only priorities between themselves, resulting by operation of law.—*Brooks v. Hildreth*, 22 Ala. 469. The City Court did not err in refusing to suspend proceedings and cause notices to issue to the parties issuing garnishments subsequent to the service of the garnishment of the appellant which had been served. *Prima facie*, they claimed, not in hostility or in priority to the appellee, but in subordination to his right, and there was no contest for the court to determine, and no peril of double vexation to the appellant.

Affirmed.

## **Fitzsimmons, Trustee, v. Howard.**

### *Attachment by Landlord against Tenant for Rent and Advances.*

1. *Attachment by landlord for rent or advances ; what affidavit must show.*—The affidavit for an attachment by the landlord against his tenant for rent or advances, must state, (1) that the plaintiff is the landlord, and that the defendant is his tenant ; (2) that there is, or will be due to the landlord from the tenant a debt or demand for a specified amount, for rent for the current year, or for advances, etc., one or both, and (3) that one of the grounds for attachment in such cases exists. These are jurisdictional averments, which the affidavit must contain ; and failing in either of them, it is not amendable.

2. *Same ; when may be abated on plea for insufficiency of affidavit.*—An affidavit for an attachment by a landlord against his tenant for rent or advances, is fatally defective, when it fails to set forth the relation of landlord and tenant, either directly or by implication, and fails to aver a demand for the rent after the maturity of the debt ; and an attachment issued thereon may be abated on plea.



(Fitzsimmons, Trustee, v. Howard.)

3. *Same; when plea in abatement sufficient on demurrer.*—A plea in abatement to an attachment which sets forth several defects in the affidavit, some of which are of substance, and others not, is not obnoxious to the rule, which requires that a plea in abatement shall be confined to a single matter of defense. Such defects do not constitute two defenses, but merely two grounds supporting one defense.

APPEAL from Russell Circuit Court.

Tried before Hon. H. D. CLAYTON.

This cause was commenced on 6th December, 1880, by an attachment sued out by O. P. Fitzsimmons, as trustee of Mrs. M. B. Fitzsimmons, against T. B. Howard, to recover rent and advances. The affidavit avers that the defendant is justly indebted to the plaintiff, as such trustee, "in the sum of fifteen hundred dollars for rent and advances as follows, to-wit: The amount of twenty-one bales of lint cotton, good average crop grade, which was and is the balance due of the thing agreed to be received and paid as rent for the year 1880, and that eleven hundred dollars is the money value of said twenty-one bales of cotton, balance so agreed to be received and paid as rent for the current year; and also the further amount of eight bales of lint cotton, good average crop grade, of the value of four hundred dollars, as advances made by said plaintiff to said defendant, said advances being as follows, to-wit: The said defendant being a tenant of said plaintiff for and during the year 1879, failed to discharge his indebtedness to the said plaintiff for rent for the said year by and to the extent of the amount of eight bales of cotton, as aforesaid, which said eight bales of cotton became and are advances to the defendant from the plaintiff for making the crop of the succeeding year; and deponent further says that each of the aforesaid several sums are due, and the defendant has failed and refused, after demand made, to pay the same." The defendant cravedoyer of the affidavit and attachment, and pleaded in abatement, setting up, among other alleged defects in the affidavit, in substance, that it failed to show that the relation of landlord and tenant existed between the plaintiff and defendant, and that it failed to aver any demand for the rent or advances at or after the time when they became due. The court having overruled a demurrer to the plea, the plaintiff asked leave to amend the affidavit so as to cure the defects mentioned above; but the court refused to allow the plaintiff to amend, and he excepted. Thereupon the court entered judgment, sustaining the plea in abatement, and quashing the attachment.

The rulings of the Circuit Court above noted are here assigned as error.

[Fitzsimmons, Trustee, v. Howard.]

L. W. MARTIN, J. B. MITCHELL, and CLOPTON, HERBERT & CHAMBERS, for appellant.

GEO. D. & GEO. W. HOOPER, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—Attachment is not an ordinary remedy, given and governed by the rules of the common law. It is statutory, and, to some extent, extraordinary. There are many grounds for its issuance—several of them for the enforcement of liens declared by statute. The present case is one of that class. Its purpose is to enforce an alleged lien for rent and advances. This extraordinary process can not be resorted to, except in cases specified in the statute; and the first step to be taken is an affidavit, to be made by the plaintiff, his agent or attorney. This is the foundation-authority, without which the attachment can not be rightfully issued. Certain averred facts are a necessary prerequisite to the issue of this writ; matters of substance, without which the plaintiff shows no right to have this process granted to him. If any of these substantial elements are omitted from the affidavit, and the objection be properly raised, the defect is not amendable. Among these essential matters of substance, when the claim is for land-rents, or for advances made by the landlord, or by his procurement, are the following: That the plaintiff is the landlord, or his assignee, and that the defendant is the tenant of such landlord—thus necessarily implying the relation of landlord and tenant, as to the very land for which rent is claimed to be due; that there is, or will be due to the landlord a debt or demand for a specified amount, for rent for the current year, or for advances, etc., one or both, and that one of the following four grounds for attachment exists:

1. That the claim asserted is *due*, and the tenant, on demand made after maturity, refuses or fails to pay it. And whether the claim for rent or advances is due, [has matured], or not;
2. When any party interested in the claim, his agent or attorney, [makes oath that he] has good cause to believe that the tenant is about to remove from the premises, or otherwise dispose of the crop without paying the amount that will be thus due.
3. That the tenant has removed from the premises, or otherwise disposed of some part of the crop, without paying such amount, [the amount shown to be due, or to become due], without the consent of the plaintiff.
4. When the tenant has disposed of, or the plaintiff has good

[Johnson v. The State.]

cause to believe he is about to dispose of the articles, or some of the articles advanced, etc.

These are jurisdictional averments, which the affidavit must contain; and failing in either of them, it is not amendable.—Code of 1876, §§ 3467, 3470, 3472, 3473; *Sims v. Jacobson*, 51 Ala. 186; *Staggers v. Washington*, 56 Ala. 225; *Hawkins v. Gill*, 6 Ala. 620; *Tucker v. Adams*, 52 Ala. 254. An affidavit for attachment wanting in any of these essentials, will be abated on plea.—*Brown v. Coats*, 56 Ala. 439; *De Bardeleben, v. Crosby*, 53 Ala. 363; *Hall v. Brazleton*, 40 Ala. 406. A new principle is introduced in section 3469 of the Code, by which a balance of unpaid rent for one year becomes an advance to the tenant for the next year, if the tenancy continues. All the ingredients of the affidavit, save those mentioned above, are matters of form, and are amendable. The affidavit in the present case must be pronounced insufficient. It fails to set forth the relation of landlord and tenant, either by direct averment, or by necessary implication; and it fails to aver a demand for the rent after the maturity of the debt.

It is contended for appellant that the demurrer to the plea in abatement should have been sustained, because the plea is double. There are three pleas in abatement. Plea number 2 only complains of defects in the affidavit. True, it sets forth several defects, some of which are of substance, and others not. We do not think this falls within the principle, which requires that a plea in abatement shall be confined to a single matter of defense. The substance of the plea is, that the affidavit is defective in substantive averment. The fact that there are two important omissions does not impose the necessity of relying on them separately. They do not constitute two defenses, but two grounds, supporting one defense.

Affirmed.

## Johnson v. The State.

*Prosecution under Section 4354 of the Code, for Selling or Conveying Personal Property covered by Mortgage.*

1. *Jurisdiction of county court of Hale county.*—Under the statute conferring on the county court of Hale County “jurisdiction of all misdemeanors committed in said county” (Pamph. Acts, 1879–80, p. 295), that court has jurisdiction of a prosecution for misdemeanor, which was commenced by a warrant of arrest issued by a justice of the peace of the county, as a committing magistrate, who required the defendant to give



[Johnson v. The State.]

bail for his appearance before the county court to answer the accusation.

2. *Prosecution for selling or conveying mortgaged property under § 4354 of the Code ; when no variance between accusation and proof.*—There is no variance between an accusation in a prosecution for selling or conveying personal property covered by written lien or mortgage, under section 4354 of the Code of 1876, pending in the county court, and the proof, where the accusation avers that the mortgage was written or printed, and the mortgage introduced in evidence was partly written and partly printed.

3. *Same ; statute extends to printed mortgages or liens.*—The provisions of this statute (Code, § 4354) not only extend to *written* mortgages, liens and deeds of trust, but also extend to, and comprehend mortgages, liens and deeds of trust which are printed, or partly printed and partly written.

4. *The word "writing" includes printing.*—The declaration of section 1 of the Code of 1876, that "writing" includes printing on paper, is but a general rule of construction which would be applied in the absence of such statutory declaration.

5. *Section 4354 of the Code construed ; the word "convey" includes an exchange.*—The word *convey* as used in the statute making it a misdemeanor to sell or convey personal property upon which there is a written lien or mortgage, etc. (Code, § 4354), includes a *transfer* of property by *exchange*.

#### APPEAL from Hale County Court.

Tried before Hon JAMES M. HOBSON.

This was a prosecution under section 4354 of the Code of 1876, and was commenced by a warrant of arrest issued by a justice of the peace, acting as a committing magistrate, upon an affidavit made before him. The defendant waived an examination before the justice and gave bail, as required by that officer, for his appearance before the county court, to answer the charge preferred against him. On the trial, had before a jury, evidence was introduced by the State, tending to show that within twelve months before the commencement of the prosecution, in said county, the defendant "swapped a mule colt" which he had conveyed by mortgage to one O'Donnell, for a horse. This mortgage was partly written and partly printed. The facts touching the other questions decided by the court, are sufficiently stated in the opinion.

The court, *ex mero motu*, charged the jury, that if they believed "from the evidence beyond a reasonable doubt, that the defendant, within twelve months before the commencement of this prosecution, in the county of Hale, in this State, swapped a mule colt upon which he had given a mortgage, partly written and partly printed, for a horse, without the consent of the holder of said mortgage, the debt secured by said mortgage being at that time unpaid, in whole or in part, they should find the defendant guilty." The defendant excepted to this charge, and also to the refusal of the court to charge the jury, at his written request, that if they believed the evidence, they must find him not guilty. The jury returned a verdict of guilty, as-

[Johnson v. The State.]

sessing the fine, upon which the defendant was sentenced by the court.

THOS. SEAY, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The first question to which counsel directed argument is, whether the county court had jurisdiction of the cause—a prosecution for misdemeanor, commenced by a warrant of arrest issued by a justice of the peace, as an examining magistrate, who required the defendant to give bail for his appearance before the county court, to answer the accusation. The proposition is, that the county court of Hale county has final jurisdiction of misdemeanors, only in two classes of cases; *first*, when the accusation is preferred originally before the court; *second*, when an indictment has been presented to the circuit court by a grand jury, and it has been certified, or returned by the clerk of that court to the county court. There is no doubt of the jurisdiction of the county court in these cases, and, as we think, but little, if any doubt that it extends to all other prosecutions for misdemeanors, commenced by writ of arrest issued by a committing or examining magistrate. The grant of jurisdiction to the county court of Hale is very broad and general, expressed in these words: “The county court of Hale county shall have jurisdiction of all misdemeanors committed in said county.”—Pamph. Acts, 1879–80, p. 295. Though the grant is broad and general, it does not extend to prosecutions for misdemeanors already commenced in the circuit court. The jurisdiction of the county court does not exclude that of the circuit court, which was pre-existing. The two courts would have concurrent jurisdiction; and in the class of cases referred to, the jurisdiction of the circuit court having attached, upon familiar principles, the court first taking jurisdiction, retains it to the exclusion of the other. The second and fourth sections of the act referred to, require all prosecutions for misdemeanors commenced in the circuit court, to be returned or certified to the county court, and, when so returned or certified, declares the jurisdiction of the circuit court shall cease, and that of them exclusive jurisdiction shall vest in the county court. These sections, so far from being merely descriptive of the class of cases to which the general grant of jurisdiction in the first sections extends, or a limitation upon that jurisdiction, is in enlargement of it. The tenth section of the act extends and applies to the court all laws of a general na-

[Johnson v. The State.]

ture concerning misdemeanors, unless there was some provision or limitation in the act to the contrary. If in express words it had been declared that the jurisdiction of the court should extend to prosecutions for misdemeanors instituted as was this prosecution, the intention of the legislature would have been but little plainer.—*Blankenshire v. State*, at present term. True, if the magistrate had held the accused to appear and answer before the circuit court, it is possible the case would have been passed upon by the grand jury. But the power of the General Assembly to dispense with a grand jury in all prosecutions for misdemeanor, and to commit jurisdiction of them to inferior courts, or to justices of the peace, is declared by the constitution.

2. The statute on which the prosecution is founded (Code of 1876, § 4354), declares: "Any person who sells or conveys any personal property upon which he has given a written mortgage, lien, or deed of trust, and which is then unsatisfied in whole or in part," etc., is guilty of a misdemeanor. The accusation avers the mortgage, or lien is written or printed. The mortgage produced in evidence was partly written and partly printed; and an objection to its admissibility was taken upon two grounds; *first*, that it varied from the description in the accusation; *second*, that the statute extends only to written mortgages or liens, and does not comprehend a mortgage, lien, or deed of trust, partly printed and partly written. An alternative averment of this character, in an indictment for this offense, would correspond to the form of indictment prescribed for the analogous offense of buying, removing, or selling property, to which others have a claim, created and defined by the preceding section of the Code. See Form 57, p. 997, Code of 1876. Such an averment would authorize the introduction in evidence of an instrument, either written or printed. If it was not included in the one, it would be included in the other averment. They are the equivalent, in our practice, of separate counts. As the averment would be sufficient in an indictment, it is equally sufficient in an accusation before the county court, where a simple designation of the offense by name, involves the averment of every fact necessary to constitute it. The point, however, is, that the instrument introduced in evidence is neither written, nor printed, but both, and, therefore, does not fall within either alternative of the accusation. The Code, in defining words used in it, declares that "writing" includes printing on paper.—Code of 1876, § 1. This is but a general rule of construction, which would have been applied in the absence of statutory declaration.—*Saunderson v. Jackson*, 2 Bos. and Pul. 238; *Henshaw v. Foster*, 9 Pick. 312. Any other construction of the term *writing* or *written*, when applied to



[Johnson v. The State.]

instruments of the character expressed in the statute, would be too close and narrow; and would lead to confusion, and the disappointment of the intention of parties transacting business in good faith. There are numerous instruments, now in daily use in the transaction of business, required by law to be in writing, which are partly engraved, partly printed, and partly written. In that form, they satisfy all the purposes of the law, that they shall be in writing—shall not rest in the uncertainty, and be subject to the frailty of mere oral evidence. The purpose of the requisition of the law, that they should be in writing, being satisfied, no good reason can be assigned for taking the word *writing* or *written*, as applied to them, in a narrow, close sense, whether the word is found in a statute, or in pleading, limiting it to tracing with pen or pencil, and excluding impressions by printing or stamping, which may be more enduring. Words expand in signification, to meet the varied exigencies of the community, and to adapt themselves to the sense in which they are generally employed. Bills of exchange, checks, promissory notes, memoranda of sales, conveyances of property, real or personal, liens upon property which are multiplied far beyond the common law signification of a lien, and now embrace every charge upon property for the security of a debt, are all found partly written, and partly printed. Time and labor are saved by the employment of such instruments, and no purpose of the law requiring them to be in writing is evaded. In either form, they furnish permanent evidence of the contract, in every respect as unimpeachable as if they were wholly traced by a pen or pencil. It would be the merest *sticking in the bark*, to declare such instruments were not within the word *written* or *writing*, when applied to them in either pleading or in a statute.

3. We shall not now determine whether the statute would extend to an exchange of property, if it had not employed some other word than *sell*. A sale, it is true, differs materially in its properties from an exchange or barter. A power to *sell* may not, as a general rule, comprehend a power to exchange.—*Cleveland v. State Bank*, 16 Ohio St. 236. And a penal statute, in derogation of the common law, directed by its words against sales only, may be incapable of a construction which would embrace an exchange.—*Gunter v. Leckey*, 30 Ala. 591. These are not inflexible rules, and cannot be applied, when it is clear, the intention of the donor of the power, or of the law-maker, would be defeated. The statute by its words embraces not only a sale, but a conveyance of the property. The word *convey*, when applied to a disposition of property, has the signification of *transfer*; and means the passing of title and dominion from one person to another. It is in this, its largest sense, it is em-

[Nelson, Ex'r, v. Murfee.]

employed in this statute, intended to prohibit the mortgagor, or maker of a lien, or grantor in a deed of trust, from disposing of the property, so that the security of the mortgage or lien, or deed of trust, would be endangered or embarrassed. The danger or embarrassment would result not only from a sale, but from an exchange, a gift, or any other transfer, by which a title, not in subordination to the mortgage, lien, or deed of trust, was created, or by which the possession was changed. A word of large meaning was employed by the law-maker, to prevent evasion of the statute, by the adoption of other instrumentalities than such as would have been designated by a word of more limited significance. An exchange is a transfer of the property, violative of the statute.

We do not find error in the record, and the judgment of the county court is affirmed.

## Nelson, Ex'r, v. Murfee.

### *Action against Surety on Official Bond of Sheriff for Failure to Make Money under Execution.*

1. *Lands of decedent ; title in heirs subject to administration.*—Under our statutes, as at common law, the title to lands, on the death of the ancestor, descends immediately to the heir at law ; but unlike the rule of the common law, it does not vest in the heir absolutely, but the descent may be intercepted, and the possession claimed and held by the personal representative, for the purposes of administration.

2. *Same ; power of personal representative to sell.*—Among the unquestionable powers conferred upon the personal representative, is the right to petition for, and obtain an order, to sell the lands of the decedent for the payment of debts ; and when this right is asserted, and the lands are sold and conveyed under the order thus obtained, the title to the land which had descended to the heir, is completely divested ; and notwithstanding the heir may have sold and conveyed lands, or they may have been sold and conveyed as his property, the title the personal representative conveys, is not in the least impaired.

3. *When heir a debtor to ancestor, whether administrator has a prior right to lands descended, quare.*—When the heir is indebted to the estate of the ancestor, and is insolvent, whether the administrator has any prior right to demand payment out of the lands descended, which remain unsold, or whether it becomes a mere race of diligence between him and other creditors of the heir, is a question not raised in this case ; and while the court “ is not prepared to admit it becomes a mere race of diligence,” the question is left open and undecided.

4. *Proceeds of sale of land for payment of debts in hands of personal representative ; its qualities.*—While money acquired by the personal representative from the sale of lands, for payment of debts, and remaining in his hands for distribution after paying the debts, will be treated as having the qualities of land for certain purposes of administration and

[Nelson, Ex'r, v. Murfee.]

succession, for all other purposes it is only money in the hands of the administrator; and any process or procedure to get it out of his hands, must necessarily be that which is adapted to the recovery of money as money.

5. *Same; personal representative has priority over heir's other creditors.* When a surplus of money thus acquired remains in the hands of the personal representative for distribution, he is entitled to retain the share of an heir or distributee in such moneys in payment of a debt which the latter owes to the decedent's estate, as against, and in preference to the claim of a judgment creditor of such heir or distributee.

APPEAL from Hale Circuit Court.

Tried before Hon. GEO. H. CRAIG.

The facts are sufficiently stated in the opinion.

THOS. R. ROULHAC and J. J. GARRETT, for appellant. (1). It is settled that upon the death of a person seized of an heritable estate in lands, the title descends to, and vests in them. *Doe v. Hardy*, 52 Ala. 297; *McCully v. Chapman*, 58 Ala. 328; *Calhoun v. Fletcher*, 63 Ala. 580. This title, so vested, may be alienated or devised by the heir, and the better opinion, therefore, seems to be, that where lands are made subject to execution, as is now universally the case, and there is no statutory prohibition of a levy upon, and sale of the interest of the heir in the lands of the estate, still unadministered, such interest, like other beneficial legal estates, is subject to execution.—Freeman on Ex. § 183; Rorer on Jud. Sales, §§ 631 and 646; Code of 1876, § 3209, Sub. 1; *Smith v. Hall*, 20 Ala. 784; *Graham v. Abercrombie*, 8 Ala. 552. (2). But the statutes of this State charge the whole property of a decedent, real and personal, with the payment of his debts.—Code of 1876, §§ 2429, 2252, 2261. The interest of the heir in the real estate of his ancestor is, therefore, qualified. His interest is *in* the estate, and *the estate* is superior to any interest therein. The estate must answer first to any claims thereon before any interest therein can be recognized, or its benefits obtained; and the rights and powers conferred on the personal representative by the statute may either suspend or destroy the heir's right to the possession, his title, where the ancestor left debts.—*Calhoun v. Fletcher, supra* (3). Were John and Jabez C. Nelson, or their assignee, or purchaser at execution sale, here claiming either a legacy, or a distributive share of the personal assets of an estate, while retaining, by their indebtedness, a part of the assets of the estate in their own hands, there would scarcely arise a question at this day as to the right of the representative to withhold their legacy or share to the extent of their indebtedness.—Adams' Eq. m. p. 223; Toller on Ex. 338; Waterman on Set-off, § 190. Real estate now being under our statute assets, the principle upholding this right of the representative, in case of a legacy or dis-



[Nelson, Ex'r, v. Murfee.]

tributive share in personal assets, clearly authorizes the personal representative, in a case like the present, to retain in his hands the share of the heir in moneys in his hands for distribution, derived from the sale of lands, made for the payment of debts. Both real and personal property are assets, subject to the payment of debts, and the heir and distributee take either and both species of property by the same source of right, and in the same manner. See 1 Story's Eq. Jur. (12th Ed.) § 522 *a*. (4.) It is settled in this State that the representative of Gideon E. Nelson would, on her settlement, be chargeable with so much of the debt due her intestate's estate, as she had property or money of the debtor in her hands belonging to the estate. *Miller v. Irby's Adm'r*, 63 Ala. 486. It would have been a want of due diligence in not collecting debts due the estate, and therein a *devastavit*; and so having the money in hand with which to pay the debt, the law treats it as paid. If the representative had paid the debt with her own means, or had used means of her own to pay debts of the estate with, treating John and Jabez C. Nelson's debt as received by her, there can be no doubt she would, from the sale of the lands, be allowed to retain for her indemnity.—*Miller v. Irby's Adm'r*, *supra*; *Livingston v. Newkirk*, 3 Johns. Ch. 312. (5). It can not be said that the facts of this case present a case of a race of diligence between the personal representative and a judgment creditor of the heir. A race implies a fair start, at least; and here there was no one to represent the deceased person, until the grant of letters testamentary or of administration; and such authority can not be obtained, under any circumstances, in less than fifteen days.—Code of 1876, § 2357. The case of *Mann v. Mann*, 12 Heisk. 245, is relied on to sustain this position; but we submit that the conclusion reached in that case can not be supported on principle or authority. (6). There is another view which greatly strengthens appellant's position. By section 2261 of the Code of 1876, an intestate's personal property, after payment of debts and charges, is to be distributed in the same manner as his real estate; and by section 2252 of same Code, his real estate, subject to the payment of his debts and charges, descends to his children or their descendants, or if none, to his brothers and sisters, or their descendants, etc.; and in both instances, in equal parts. These statutes secure uniformity of assets (1 Story's Eq. Jur. 12th Ed. § 552 *a*.), and also equality of descents and distribution. Now it is susceptible of mathematical demonstration, that if John and Jabez C. Nelson did not pay their debt to the estate, and it could not be retained out of their shares, as heirs, in Gideon's estate, by that fact alone the other heirs would be deprived of some portion of their inheritance, thereby destroying the equality of descent and distribution, a part

[Nelson, Ex'r, v. Murfee.]

of the inheritance. (7). A purchaser from the heir only takes his title and interest.—Freeman on Ex. § 183; Rorer on Jud. Sales, § 968; *Avent v. Read*, 2 Port. 480; *Lawson v. Orear*, 4 Ala. 156; *Cook v. Webb*, 18 Ala. 810; *Doe ex dem. Stevens v. King*, 21 Ala. 429; *Lang v. Waring*, 25 Ala. 625; *O'Neal v. Wilson*, 21 Ala. 288; *Childress v. Childress*, 3 Ala. 752; *Duffee v. Buchanan*, 8 Ala. 27; *Brown v. Lang*, 14 Ala. 721; *Lang v. Brown*, 21 Ala. 193; *Flynn v. Williams*, 1 Ir. Law, 509; *Rutherford v. Green*, 2 Ir. Eq. 122–8; *Procter v. Newhall*, 17 Mass. 91; *Goodman v. Benham*, 16 Ala. 625; Redf. on Wills, Part II, Chap. XIII, § 46, subd. 19, (3d Ed.) p. 388; *Willes v. Greenhill*, 29 Beav. 376; *Graham v. Abercrombie*, 8 Ala. 559; *Jeffs v. Woods*, 2 Pere Wms. 128. (8). As to the right of the personal representative to retain the shares of John and Jabez C. Nelson in this case, see also the following authorities: *Clapp v. Miserole*, 1 Abb. (N. Y.) 362; 1 Story's Eq. Jur. (12th Ed.) §§ 541, 579; *Skinner v. Sweet*, 3 Madd. 244; *Adair v. Shaw*, 1 Sch. & Lef. 262; *Plumer v. Marchant*, 3 Bur. 1380; Iredell on Executors, 529, § 4.

THOS. SEAY, *contra*.—(1). At common law a debt due the ancestor by the heir did not operate as a lien upon the real estate. The estate of the heir in the lands of the ancestor, *eo instanti*, upon the death of the ancestor, became as absolute as that of the ancestor himself.—4 Kent's Com. pp. 415–74; Wharton's Dig. p. 445, § 366; *McCoy v. Scott*, 2 R. 222, Lomax' Dig. pp. 744–5; *Procter v. Newhall*, 17 Mass. 81. And at common law the administrator was a stranger to the realty, having no power or control over it. If the personal estate was not sufficient for the payment of debts, the specialty creditors of the deceased had to proceed against the heir. The office of an administrator pertained only to the personalty. These are elementary rules, needing no citation of authorities to support them. (2). A lien, in its most extensive signification, includes every case in which real or personal property is charged with the payment of any debt or duty.—2 East. 235; 6 *Ib.* 25; 2 Camb. 579; 2 Rose, 357; 1 Dall. 345; 1 Story's Eq. Jur. § 506. (3). The administrator, at common law, had no claim against, or upon the real estate descended to the heir “for the payment of any debt or duty due the ancestor by the heir.” The administrator and the heir were perfect strangers. The administrator, the *personal* representative, had possession of the personal estate; the heir had the title and right of possession of the real estate. See 1 Whart. Dig. p. 445; §§ 366–7. (3). The debts due the intestate by the heir, then, if our views of the common law are correct, were upon the same footing, *as far as the heir's real estate* descended was concerned, as

[Nelson, Ex'r, v. Murfee.]

debts due by strangers; and it was the duty of the administrator to proceed against the heir as in the case of other debtors. (4). If then an administrator can claim a charge upon the real estate for a debt due by the heir to the ancestor, the power of doing so must be conferred by our statutes. The statutes give to the administrator the power to rent the real estate (Code, § 2446); to sell the same under the decree of the probate court for the payment of debts (*Id.* 2447-8); and some other minor powers. (5). Powers are either coupled with an interest, or are collateral and without an interest.—4 Kent's Com. 309; Cruise's Digest, Title 32, Ch. 13, and cases there-cited. It seems that the powers conferred upon the administrator by the statutes in question are analogous to the case where a man, at the common law, devises that his executor shall sell his land, which, says Lord COKE, gives no interest to the executors, but is simply a naked power without an interest.—Lit. § 169. Such powers are strictly construed.—*Martin v. Martin*, 43 Barb. (N. Y.), 72; 2 How. Pr. (N. Y.), 385. These statutes are analogous to those in regard to free dealers, enabling the administrator "to do that which, heretofore, he had no power to do." Enabling statutes are strictly construed.—*Dreyfus v. Wolffe*, 65 Ala. 496, and cases there cited. This is manifest when we consider the renting of land of the decedent, and the disposition of the rents. The statute expressly directs that the rents shall become assets.—Code of 1876, § 2446. Without this the rents would have gone to the heir as incident to the reversion. *McCoy v. Scott*, 2 R. 222; 1 Whart. Dig. p. 444, §§ 365-7. (5). The debt in this case can not be construed as an advancement. See *Parker v. McCluer*, 5 Abb. Pr. (N. Y.) 97; S. C. 3 Keys, 318; 36 How. Pr. (N. Y.), 30; *Chase v. Ewing*, 51 Barb. (N. Y.) 597; Story's Eq. Jur. § 1110; 3 Y. & C. 392; 5 M. & C. 29; *Hine v. Hine*, 39 Barb. (N. Y.), 507; *Procter v. Newhall*, 17 Mass. 80, and cases there cited; *Mann v. Mann*, 12 Heisk. (Tenn.) 245; *Johnson v. Hoyle*, 3 Head (Tenn.) 56; *Towles v. Towles*, 1 Head, 601; Maine Dig. §§ 1870-79, p. 23; Bell's Dig. (N. H.) p. 216. (6). It is clear the administrator has a lien upon personal assets for a debt due the ancestor by the heir; and the same is true as to executors and legatees. *Clapp v. Miserole*, 1 Abb. Dec. (N. Y.), 363. And the cases cited by opposite counsel in opposition to the rule that "an administrator can not set off a debt due the ancestor by the heir against the claims of the heir upon the descended realty," are where the administrator or executor set off debts due the deceased by the distributee or legatee, against the distributive share or legacy of such distributee or legatee. (7). But the rule is different as to realty. "In the division of real estate among heirs, no deduction can be made from the share of any one of



[Nelson, Ex'r, v. Murfee.]

them, on account of any debt due from him to the estate." *Vaden v. Hance*, 1 Head (Tenn.), 301; *Mann v. Mann*, 12 Heisk. (Tenn.), 246; *Procter v. Newhall*, 17 Mass. 81.

STONE, J.—Gideon Nelson died intestate, leaving as his next of kin, heirs at law and distributees, his two brothers, John and Jabez C., who, with four others, inherited his estate, each being entitled to one-sixth part thereof. Gideon's personal estate was insufficient to pay his debts, and his lands were sold for that purpose, under an order of court obtained therefor. His entire landed estate was sold under that order, and its proceeds, together with the personal assets, paid the debts and expenses of administration, and left a surplus of fifteen hundred dollars for division or distribution; that is, two hundred and fifty dollars for each heir or distributee. John and Jabez C. were each insolvent; and being indebted to their brother Gideon, he, in his lifetime, obtained a decree against them for something over twelve hundred dollars. That decree was wholly unsatisfied and uncollectible at the time of Gideon's death.

Before the death of Gideon Nelson, James T. Murfee, the appellee, recovered a judgment against John and Jabez C. Nelson, for a fraction over one thousand dollars, on which nothing had been realized. Immediately after Gideon's death, and before administration had been, or could have been obtained on his estate, Murfee caused an execution, issued on his judgment, to be placed in the hands of the sheriff, with instructions to levy on the interests of John and Jabez C. in the lands descended to them from the estate of their deceased brother, Gideon. The sheriff failed to make such levy, and returned said execution no property found. The present is a suit on the sheriff's bond, prosecuted against the executors of one of his sureties, and seeks to recover the amount of the execution, on the alleged ground that, with proper diligence, the sheriff could have made the money. As to the facts summarized above, there is no conflict in the testimony.

Under our statutes, as at common law, the title to lands, on the death of the ancestor, descends immediately to the heir at law, or next of kin. Unlike the rule of the common law, however, it does not vest in the heir absolutely, but the descent may be intercepted, and the possession claimed and held by the personal representative, for the purposes of administration. In *Calhoun v. Fletcher*, 63 Ala. 574, we discussed the various powers the personal representative may assert over the realty, and need not here repeat what we there said. Among the unquestioned powers conferred upon him, is the right to petition for and obtain an order to sell the lands of his testator or intestate, for the payment of debts. When this right is asserted,

[Nelson, Ex'r, v. Murfee.]

and the lands are sold and conveyed under the order thus obtained, the title to the land which had descended to the heir, is completely divested. And notwithstanding the heir may have sold and conveyed the lands, or they may have been sold and conveyed as his property, the title the personal representative conveys, is not in the least impaired or affected thereby. This is the legitimate effect of our statutory system, which subjects the lands of a decedent to the payment of his debts of every class, when the personal assets are insufficient therefor. Our laws of descent of realty, except as to dower, homestead, and the husband's rights in the statutory separate estate of a deceased, intestate wife, carry the estate to the same persons, and in the same proportions, as the law of distributions carries the personalty.—Code of 1876, §§ 2252, 2261. And lands of a decedent are equally with personal estate chargeable with the debts, except that the personal estate must be first exhausted. Code of 1876, §§ 2429, 2447. As said by Chancellor Kent, Vol. 2, Com. 427, in margin: "In a majority of the States, the descent of real and personal property is to the same persons and in the same proportions, and the regulation is the same in substance as the English statute of distributions, with the exception of the widow, as to the real estate." We need not and do not decide in this case what would be the rights and remedies of the administrator, if the descended lands remained unsold. Whether, when the heir is insolvent and owes the estate of the ancestor, as in this case, the administrator has any prior right to demand payment out of lands descended, or whether it becomes a mere race of diligence between him and other creditors of the heir, is a question not raised by this record. See *Towles v. Towles*, 1 Head, 601; *Mann v. Mann*, 12 Heisk. 245; *Procter v. Newhall*, 17 Mass. 81; *Hancock v. Hubbard*, 19 Pick. 167. While it is manifest the probate court could grant no relief to the administrator in such a case, by reason of its limited, statutory powers, we are not prepared to admit it becomes a mere race of diligence. We, however, leave this question open, as its decision in this case is unnecessary. See *Brown v. Lang*, 14 Ala. 719; *Goodman v. Benham*, 16 Ala. 625; *Miller v. Irby*, 63 Ala. 477.

As we have said, in the present case it became necessary to sell the lands for the payment of debts, and the lands were so sold, reducing them to money. After paying the debts and the expenses of administration, there remained fifteen hundred dollars for division or distribution among the next of kin; equal to two hundred and fifty dollars to each, or five hundred dollars to the two, John and Jabez C. Nelson. Now, however much money, thus acquired and held, will be treated as having the qualities of land for certain purposes of administration and

[Nelson, Ex'r, v. Murfee.]

succession,—*Teague v. Corbitt*, 57 Ala. 529,—still, for all other purposes, it is only money, and money in the hands of the administrator. Any process or procedure to get it out of the administrator, must necessarily be that which is adapted to the recovery of money as money. It follows that the distributive shares of this sum to which John and Jabez C. Nelson were entitled, was money in the hands of the administrator, and rightfully in his hands by operation of law. Being money in his hands, the question arises, had the administrator the right to retain it, in part payment of the debt the distributees owed his intestate. In Adams' Eq. 223, in margin, it is said: "There are some cases occasionally spoken of as depending on an equitable set-off, but which would be more correctly termed retainers in the nature of set-off. As for example, where a legatee is indebted to his testator's estate, and the executor, instead of paying the legacy, is entitled to balance it against the debt." In Toller on Executors, 338, it is said: "If a legacy be left to the testator's debtor, the debt shall be deducted from the legacy." So, in Waterman on Set-off, § 190, is the following language: "The right of the executor or administrator to retain in such cases, depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share, while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid, or which were necessary to extinguish other claims on that fund." In *Ranking v. Barnard*, 5 Maddock Ch. Rep. 32, ruled in 1820, the court said: "It is clear that as against the husband, the executors of the testatrix would have had a right to satisfy the legacy, by writing off so much of the debt due from the husband to the estate of the testatrix, and they must have the same right against the assignees of the husband." See, also, *Cherry v. Boulthbee*, 4 Myl. & Cr. 442. In *Keim v. Muhlenberg*, 7 Watts, 79, the ruling was that "a legatee, who is indebted to the estate of his testator, is not entitled to recover his legacy, nor that which he holds by assignment in right of another legatee, so long as any part of that debt, equal to the amount of the legacies claimed, remains due and unpaid; and the assignee of such legatee can be in no better situation than the legatee himself."—*Goodman v. Benham*, 16 Ala. 625; *Miller v. Irby*, 63 Ala. 477; *Livingston v. Newkirk*, 3 Johns. Ch. 312. We concur in what is said above, and hold that the administrator of Gideon Nelson had a right to retain the money in his hands, to the extent John and Jabez C. owed his intestate; and he had an equal right to retain, against any transferee of theirs, or a purchaser of their interest at sheriff's sale. Many of the rulings in the court below are opposed to these views.—*Wilson v. Strobach*, 59 Ala. 488.



[Nelson, Ex'r, v. Murfee.]

We have no inclination to disturb the rulings in *Sprowl v. Lawrence*, 33 Ala. 674. See, also, *Tutwiler v. Steele*, 68 Ala. Rep. 107.

Reversed and remanded.

# INDEX.

---

## ACCOUNT.

1. *Account rendered; implied admission from silence.*—Where an account is rendered by a creditor to a debtor, to which no objection is made by the latter after having a reasonable opportunity to examine it; or where the latter retained it an unreasonable length of time without objection, ordinarily his silence will be treated as an implied admission of the justness of the debt, the inference of its correctness being more or less strong according to the circumstances of the particular case. *Hirschfelder, Adm'r, v. Levy & Co., 351.*
2. *Statement of account; when allowed to go to the jury.*—In an action on an account, where it is shown, that the creditor had rendered to the debtor a statement of the account, which was a correct copy from the creditor's books, and to which the debtor made no objection, it is competent for a witness, who has knowledge of the fact, to testify that a statement of an account, purporting to be owing from the debtor to the creditor, shown him on the trial, is a correct statement from the creditor's books. In such case, the statement is a memorandum of the facts contained in the statement rendered the debtor; and though not technically evidence, it may go to the jury as a memorandum of facts in evidence before them, to aid their memory as to the testimony of witnesses. *Ib. 351.*
3. *Account rendered; notice to produce not required.*—A statement of an account sent by a creditor to a debtor is not regarded as an instrument of writing, requiring notice to be given the debtor to produce it, before oral testimony as to its contents can be received. *Ib. 351.*

## ACKNOWLEDGMENT.

See DEEDS.

## ACTION.

1. *Mortgage of unplanted crop; what action will support.*—A mortgage of unplanted crop conveys an equitable title which will support an action on the case, or *assumpsit*, but not *detinue*, *trespass* or *trover*. *Collier & Son v. Faulk & Martin, 58; Wilkinson v. Ketter, 435.*
2. *Against partnership; its nature.*—An action against a partnership by its firm name is in the nature of a proceeding *in rem*, rather than *in personam*. *Yarborough & Co. v. Bush & Co., 170.*
3. *When breach of contract by the seller of personal property will prevent a recovery based on a forfeiture.*—Where the plaintiff in an action for the recovery of chattels in specie, consisting of a steam saw and grist mill and appurtenances, claims under a forfeiture contained in a contract of sale made by him, as seller, with the defendants, as purchasers, and based on a default in payment of part of the purchase-money, and it is shown that, in violation of a clause in the contract, he failed to furnish the purchasers with certain

ACTION—*Continued.*

timber privileges, he can not recover. *Hill v. Townsend & Banks*, 286.

4. *Remedy against tenant holding over.*—Where a tenant for years holds over, and the landlord elects to treat him as tenant, an action for use and occupation arising from an implied *assumpsit*, will lie; or, it seems, the landlord may bring an action on the case for special damages. *Wolffe v. Wolffe & Bro.*, 549.

## ADMINISTRATOR AD LITEM.

1. *Appointment of prior to statute void.*—The appointment of an administrator *ad litem* prior to the statute authorizing it, was nugatory, and conferred no power or authority on the party appointed. *McCall v. McCurdy*, 65.

## ADVANCES TO MAKE CROP.

1. *Crop-lien note operates a lien only for the amount expressed therein.* A crop-lien note, executed in accordance with the requirements of the statute, for an amount expressly named therein, but containing also a stipulation, that it shall stand as security for any additional advances over and above such amount, can not operate a valid security for such additional advances, but only for the amount expressly named in the note. *Collier & Son v. Faulk & Martin*, 53.
2. *Lien for advances; when statute not complied with.*—The written note or obligation required by the statute to be executed for advances (Code of 1876, § 3286), is vitiated as a statutory crop lien, by including therein, knowingly and intentionally, a debt which was contracted for a separate and distinct purpose, and which constitutes a material portion of the consideration. (STONE, J., *dissenting*). *Comer v. Daniel*, 434.

See LANDLORD AND TENANT.

## ADVERSE POSSESSION.

1. *Possession by mortgagor or his alienee against mortgagee; when not adverse.*—As the mortgagor does not hold adversely, but in subordination to the title of the mortgagee, the presumption is that an alienee of the mortgagor holds in the same right, and asserts no higher, or independent title. If, therefore, such transaction be left to its own legal intendments, the presumption is, that the alienee, like his vendor, holds in recognition of, and subordination to the prior and paramount title of the mortgagee. *The State v. Conner*, 212.
2. *Same; when it becomes adverse.*—To convert such possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and such renunciation or disclaimer must be traced to his knowledge. *Ib.* 212.
3. *Vendor and vendee; character of vendee's possession under bond for title.*—The rule is different, however, when lands are sold, or contracted to be sold, by executory agreement, and no title is made to the purchaser. In such case, if the purchaser be in possession, he holds, and can hold only as a tenant at sufferance to the vendor, and may be evicted at his will and pleasure. *Ib.* 212.
4. *Same; possession of vendee independent and adverse.*—One who acquires possession under a conveyance from an executory purchaser, in fact acquires no title whatever, but takes the possession under title simply colorable. Such possession, however, not being in subordination to the true title, but in disregard of it, is independent and adverse, and, if permitted to continue for ten years, will ripen into a title which will defeat or maintain an action of ejectment. *Ib.* 212.



ADVERSE POSSESSION—*Continued.*

5. *Defense of not dependent on a bona fide purchase.*—The defense of adverse possession does not depend on sufficiency of title. It does not rest on any documentary title whatever, but impliedly concedes that the possession had its inception, not in right, but in wrong. *Ib.* 212.
6. *Same.*—The gist of such defense is, that the defendant and those under whom he claims have held continuous adverse, or independent possession for ten years next before the suit was brought. *Ib.* 212.
7. *What does not constitute.*—The mere possession of land will not constitute adverse possession, as the law presumes, in the absence of proof to the contrary, that every one in possession of land holds under the true or real owner. *Alexander v. Wheeler*, 332.
8. *Burden of proof.*—Adverse possession is a fact which must be proved, and the burden of proof is always cast upon him who interposes, and relies on it as a defense. *Ib.* 332.
9. *What is.*—But an actual occupancy and substantial enclosure of land by a defendant, or by those under whom he derives title, or possession, accompanied by acts of ownership inconsistent with the ownership of another, is presumptively adverse possession, but is liable to be rebutted by proof to the contrary. *Ib.* 332.
10. *When demand for possession, or notice to quit dispensed with.*—Where one in possession of land, either as tenant, or under an executory contract of purchase, repudiates his contract by an assertion of hostile possession, this is such a wrongful act as determines his prior relationship, and dispenses with a demand for the possession by the plaintiff, or a notice from him to the tenant to quit. *Ib.* 332.
8. *When it exists.*—If two proprietors of adjoining lands agree upon a dividing line between them, and erect a fence thereon, each occupying up to the fence, their possession is presumed to be adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, it will ripen into a perfect title. *Ib.* 332.
12. *Same.*—In such case, however, the intention with which possession is taken and held, must always constitute an essential consideration; and hence, if a partition fence be extended by any one of two adjacent owners, so as to embrace within his enclosure a portion of his neighbor's land through mere inadvertence, or ignorance of the location of the real line, or for purposes of convenience, and with no intention to claim the part of his neighbor's land so enclosed, but intending merely to claim adversely only to the real or true boundary line, wherever it might be, such possession is not adverse to the owner. *Ib.* 332.
13. *Same.*—But the rule is different, where the fence is believed to be the true line, and the claim of ownership is up to the fence as located, although the established boundary line is erroneous, and the claim of title is the result of the mistake. In such case there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of mistake. *Ib.* 332.
14. *When possession at first permissive, what necessary to constitute.* Where the entry upon land is merely permissive, being allowed under a mere license from the true owner as matter of favor, possession under it can become adverse only by clear, positive, open and continuous assertion of title, hostile to the true owner, and actually or constructively brought to his knowledge. *Ib.* 332.
15. *Same.*—Hence, if there be parol exchange of lands for purposes of mutual tenancy, the presumption is that the possession is not adverse, but permissive; but even in such case, if the proof show a

ADVERSE POSSESSION—*Continued.*

hostile claim of title by either of the occupants, possession for ten years under such claim may mature into a good title. *Ib.* 332.

15. *Fraudulent deed ; when it will not uphold claim of adverse possession.* Where a debtor executed a deed to lands for the purpose of placing the title beyond the reach of his creditors, and of creating a secret trust for his own benefit, he continuing in fact the real owner, and enjoying the use, products and profits of the estate, and the grantee never having been in possession of, and never having exercised or claimed any dominion or ownership over, the lands conveyed, the grantee is not, under such deed, clothed with any ownership or asserted right, which will uphold a claim of adverse possession against a creditor of the grantor, seeking to subject the lands conveyed by the deed to the payment of his debt. *Jones v. Wilson, Adm'r, 400.*
16. *When fraudulent deed will not support a plea of.*—Hostility to the title of the true owner is an essential element of adverse possession, and a possession can not be adverse, which in any contingency is intended to be in subservience and subordination to the true title. *Williams v. Higgins, 517.*
17. *Same.*—Although the grantor in a deed made to hinder, delay or defraud his creditors, remained in the actual and continuous possession of the lands conveyed, taking the rents and profits; yet, such possession not being hostile to the title of the grantee, but being intended to be in subordination to it, if the grantor's creditors should seek to reach and subject the lands, it can not be adverse. *Ib.* 517.

## AFFIDAVIT.

See ATTACHMENT.

## AGENCY.

1. *Future contracts ; when advances made therefor by broker recoverable.* In the absence of a statute pronouncing future contracts, which are mere wagers, illegal and void, the general rule is that where a party makes such contracts through a broker, for a commission only, which is payable in any event, whether loss or gain result to the principal, such broker having no interest in the contracts, the principal is bound to reimburse the broker for advances made for him, if he subsequently execute his note or bill therefor, or make an express promise to pay them, or if, with full knowledge of the facts and without objection, he permits the transaction to proceed. *Hawley v. Bibb, 52.*
2. *Contracts founded on a loan or advance of money to bet or stake as a wager ; their validity.*—If a party employ a broker to make for him contracts for the future delivery of cotton, and gives to such broker his acceptance of a bill of exchange to be discounted and used in making such contracts; and if at the time it was his purpose, as was known to the broker, neither to actually buy nor sell cotton, nor to receive or to deliver it, but simply to stake margins to cover differences in price, and, on final settlement, merely to receive or pay the difference between the contract price and the market price at the time fixed by the contract for delivery,—the consideration of the bill of exchange would represent a loan or advance of money to bet or stake as a wager on the future price of cotton; and if the contract further contemplates that the money is to be advanced and loaned in this State, upon transactions to be made here, the bill of exchange would fall within the interdiction of the statute, and would be void in the hands of an innocent holder for value. *Ib.* 52.

AGENCY—*Continued.*

3. *Attachment sued out by agent; for what damages the principal liable.*  
Where an attachment was sued out by an agent, and it is neither shown that he was thereunto authorized or instructed, nor that the principal ever repudiated the suit, this subjected the principal to actual damages, if no cause existed for suing out the process; but he is not responsible for the malice, vexatious conduct, or wantonness of the agent, unless he caused, or participated in such evil motive or conduct. *Pollock & Co. v. Gantt, 373.*
4. *Agent; authority to sell does not include authority to sell on credit.*—It is a principle well settled in the law of agency, that an authority given an agent to *sell*, does not carry with it an authority to *sell on credit*, but for *cash* only, unless such be the usage of trade. *Burks v. Hubbard, 379.*
5. *Special agent; no authority to pay his own debts with property of principal.*—A special agent clothed with authority to sell property placed in his possession, can not do so by disposing of such property in payment of his own debt. A valid exercise of his authority requires that the transaction should be one for the benefit of the principal and not of the agent—a sale proper and not a mere barter. *Ib. 379.*
6. *Same; parties dealing with bound to ascertain extent of authority.*  
Any one dealing with such special agent is bound, at his own peril, to ascertain the extent of his authority. *Ib. 379.*
7. *Onus on party claiming by purchase from agent to show authority.*  
Where personal property covered by mortgage is traced into the possession of a party who had constructive notice of the mortgage, and he seeks to defend his possession by showing that it was rightful, the burden rests upon him to prove his defense. And if he seeks to do this, by showing a purchase of the property from the mortgagor acting as the agent of the mortgagee, he must show that the mortgagor, as such agent, had authority to sell, and that, in making the sale, the authority conferred upon him by the mortgagee was strictly followed; and that, if such authority was restricted to a sale for cash, cash was in fact paid for the property. *Ib. 379.*
8. *Agent's authority to sell; repudiation of, by principal.*—In an action of trover brought by a mortgagee against a party who claims to have purchased from the mortgagor as the agent of the mortgagee, it is competent for the plaintiff to show a prompt repudiation of the mortgagor's alleged authority to sell, and the absence of such acquiescence as might have been construed into a ratification of the sale. And for this purpose, the debt secured by the mortgage being for rent and advances due from the mortgagor, as tenant, to the mortgagee, as landlord, the fact, that the latter had sued out an attachment against the former for the recovery of such rent and advances, is relevant, and the writ of attachment is admissible in evidence for the sole purpose of showing this fact. *Ib. 379.*

See ATTORNEY AT LAW.

## AMBIGUITY.

1. *Patent ambiguity; what is.*—When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, or things, this is a patent ambiguity, or ambiguity apparent. In such case, the rule is clear, from which this court will not depart, that parol proof of what was intended by the contracting parties, will not be received. *Chambers v. Ringstaff, 140.*
2. *Latent ambiguity; what is, and how explained.*—A latent ambiguity exists, when, on the face of the paper, no doubt or uncertainty exists; but by proof *aliunde*, the language is shown to be alike ap-



### AMBIGUITY—*Continued.*

plicable to two or more persons or things. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that, by which it is made to appear. *Ib.* 140.

3. *Ambiguity belonging to an intermediate class.*—There is also an ambiguity recognized in cases involving principles, which are scarcely referable to either latent or patent ambiguities. It arises when, on mere inspection, there does not appear to be any uncertainty or ambiguity, and frequently grows out of a careless use of language, and it sometimes results from the many shades of meaning that usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which has been characterized as an intermediate class of cases, partaking of the nature of both latent and patent ambiguities. In such case, parol evidence may be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred. *Ib.* 140.

### AMENDMENT.

1. *Amendments to bills ; rule prior to the statute.*—Prior to the statute (Code of 1876, § 3790), the allowance of amendments to bills in equity, as a general rule, was not a matter of right, but rested largely in the discretion of the court. They were allowed only when the bill was found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. No amendment was allowed, which was repugnant to, or inconsistent with the purposes and objects of the original bill, or which presented a new case. *Rapier v. Gulf City Paper Co.* 476.
2. *Amendments to bills under the statute.*—While the statute converts the allowance of amendments to bills from matter of discretion in the court, into a matter of right in the party, if the right is claimed at any time before final decree, such right is not without limit. The complainant can not by amendment make an entire change of parties, introduce a new cause of action, or vary the statement of facts on which the equity of the bill may depend, so that there would be an essential change in the character of the relief to which he would be entitled. *Ib.* 476.
3. *Amendment to bill ; when not allowable.*—To a bill in equity filed by one who, as assignee or purchaser, claimed the equity of redemption in real estate conveyed by mortgage, and, as such, sought to redeem, an amendment is not allowable, in which the complainant, setting up no right to the property, no title or claim to the equity of redemption, but admitting such equity to be in the mortgagor, seeks, as a mere judgment creditor, to be let in to redeem, and that the mortgaged property may be subjected to sale for the satisfaction of his judgment. Such an amendment is a radical departure from the case made by the original bill, in that a new and different right is thereby preferred, and the relief thereby sought is essentially different in character from the relief which could have been obtained on the original bill. *Ib.* 476.
4. *Same ; under Code, bill amendable to cure variance, if claimed before decree.*—This court inclines to the opinion that, under the present statute authorizing amendments (Code, § 3790), unlike the practice which formerly prevailed, a variance between the allegations and proof may be cured by amendment, but the right to amend must be claimed in the court below before final decree dismissing the bill. *Winter v. Merrick & Son*, 86.
5. *Right to amend must be claimed in lower court.*—The right of amendment is a privilege which must be claimed in opportune time in the

AMENDMENT—*Continued.*

- lower court, and can not be raised in this court for the first time. *Mohon v. Tatum*, 466; *Kingsbury v. Milner*, 502.
- 6. *When opportunity to amend must be afforded in lower court.*—But this rule is confined to cases in which the complainant had an opportunity to claim the right; and hence, a decree rendered in vacation on demurrer, dismissing the bill, without first affording the complainant an opportunity to amend, is erroneous, and, on appeal, this court will reverse the decree and remand the cause, that the appellant may amend his bill, if he so elect. *Kingsbury v. Milner*, 502.
- 7. *When court need not tender an opportunity to amend.*—Where there is a demurrer, or motion to dismiss for misjoinder or non-joinder of parties plaintiff, it is not required that the court should expressly tender an opportunity to amend. *Mohon v. Tatum*, 466.
- 8. *Amendment; when new and distinct libel can be introduced by.*—Where, in an action for libel, the libel set out and declared on, in the original complaint, relates only to the solvency of the plaintiff, and in that respect only touches his character as a merchant, an amendment may be allowed under the statute, introducing another and distinct libel, written and published at a different time from the one described and declared on in the original complaint, and touching the integrity and the personal conduct of the plaintiff, without assailing or questioning his solvency. By such amendment the form of action is not changed, and a cause of action *entirely new* is not introduced. *Mohr v. Lemle*, 180.
- 9. *Statute of limitations; its operation touching amendments.*—While new matter, forming an independent cause of action, which was not before the subject of pending suit, and of contestation between the parties, may be introduced by an amendment; yet, such amendment can not have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for the cause of action thereby introduced, at the time of making the amendment. If at the time of the introduction of such new matter, the statute has operated a bar to it, the defendant may insist upon the benefit of the statute, and to him it is as available, as if the amendment were a new and independent suit. *Ib.* 180.
- 10. *Same; amendment causing misjoinder may be stricken from the file.* An amendment to a complaint containing counts in case and trover, by which it is proposed to add the common counts in assumpsit, would cause a misjoinder; and while in such case the better practice is to put the defendant to his demurrer, as the demurrer would necessarily be sustained to the entire complaint, striking the amendment from the file is at most error without injury. *Wilson v. Stewart*, 302.

## APPEAL.

See ERROR AND APPEAL.

## ARREST.

See CRIMINAL LAW.

## ASSAULT AND BATTERY.

See CRIMINAL LAW.

## ASSIGNMENT.

- 1. *Assignment of vendor's lien.*—A vendor's lien for unpaid purchase-money, is, in its very nature, assignable; and as an incident to the debt, it passes with an unqualified assignment or transfer of the

ASSIGNMENT—*Continued.*

note or other evidence of debt given for the purchase-money. *Wilkinson v. May*, 33.

2. *Same; what constitutes.*—Where a husband sold a tract of land and caused the note given for an unpaid balance of the purchase-money to be made payable to his wife, which he delivered to her either as a gift, or as compensation for her relinquishment of dower in other lands which the husband had sold, an irrevocable appropriation or assignment of the unpaid purchase-money was thereby made, requiring no other act on the part of the husband to give it full effect; and with such assignment of the purchase-money, the lien securing the same also passed. *Ib.* 33.

## ASSIGNMENT, GENERAL.

1. *Validity of prior to Code.*—It was regarded as settled, that prior to the adoption of the Code, a debtor, though in failing circumstances, could convey the whole, or a part of his property by assignment or other form of conveyance operating as a security, to pay the whole or a part of his creditors in unequal proportions; and the only qualification to this right and power was, that the uses must have been distinctly declared, and the property, in good faith and without the reservation of any benefit to the debtor, devoted to the payment of the prescribed debts. *Danner & Co. v. Brewer & Co.*, 191.
2. *Same under the Code.*—Section 2126 of the Code of 1876 does not annul as fraudulent a general assignment creating preferences or priorities, but merely destroys, such preferences or priorities; while the assignment is preserved, and enures to the benefit of all the grantor's creditors equally. *Ib.* 191.
3. *What operates as under the Code.*—Whatever may be the form of the instrument, if it is a transfer of substantially all the debtor's property which is subject to the payment of his debts, or, in its operation and effect, there is an appropriation of the property, for the security, or payment of one or more of his creditors to the exclusion of all others, or a preference to one or more of them is thereby given, and if the property is redeemable on payment of the debts, or a trust results, expressly or by implication, to the debtor, any surplus which may remain after the debts are satisfied, the instrument falls within the statute, and thereby all preferences and priorities appointed by the instrument are annulled, and the assignment enures equally to the benefit of all the debtor's creditors. *Ib.* 191.
4. *When two or more instruments construed as.*—While a conveyance or transfer of a part of the debtor's property for the security of debts, is a *partial*, not a *general* assignment, and, therefore, not within the operation of the statute; yet, if, when the partial assignment is executed, other and successive transfers or conveyances are contemplated, covering all the debtor's property, the several instrument, when executed, will be taken together, and will form a general assignment, upon which the the statute will operate. *Ib.* 191.
5. *An absolute sale does not operate as.*—A sale, absolute, unconditional, and free from all reservation, in payment of antecedent debts, is not a general assignment, and is not affected by the provisions of section 2126 of the Code of 1876. *Ib.* 191.
6. *When mortgage executed to secure new debt construed as.*—A mortgage executed by a debtor, conveying substantially all his property as security for pre-existing debts, which are extended contemporaneously with the execution of the mortgage, and also for advances which the mortgagee stipulated in the mortgage to make to the mortgagor, and which were afterwards made in pursuance of such stipulation, is a general assignment under the Code, and the se-



ASSIGNMENTS, GENERAL—*Continued.*

- curity thereby created enures equally to the benefit of all the then existing creditors of the mortgagor. *Ib.* 191.
7. *Rights of creditors thereunder not affected by subsequent acts of the parties.*—The rights of creditors secured by an assignment attach at the time of its execution, and can not be divested or affected by any subsequent acts of the assignee and assignor, had and done without notice to them, and without their assent.
  8. *Same.*—When a mortgage with power of sale is executed by a debtor to secure one of his creditors, conveying substantially all his property, and thereby becoming a general assignment under the Code, and after the law-day, and upon default in the payment of the debt secured, the mortgagee, without executing the power of sale, enters into a new contract with the mortgagor, by which he becomes the purchaser of the mortgaged property, and the same is conveyed to him,—such contract of purchase and conveyance can not affect the rights of other creditors of the mortgagor, who under the provisions of the Code, are entitled equally with the mortgagor, to the security afforded by the mortgage.
  9. *When creditors are secured by general assignment.*—A mortgage which becomes a general assignment under the influence of the Code, enures only to the benefit of creditors whose claims or demands were in existence at the time of its execution; and their rights can not be diminished by a claim of participation preferred by subsequent creditors. *Ib.* 191.
  10. *Effect of on mortgage of lands in Mississippi.*—Under the presumption that the common law prevails in Mississippi, a mortgage, executed by a debtor in this State to secure one of his creditors, and conveying substantially all his property, including lands in Mississippi, as to such lands, does not operate as a general assignment. *Ib.* 191.
  11. *Simple contract creditors may assail under section 2126 of Code.*—Under section 2126 of Code, simple contract creditors have the right to assail, by bill in equity, an instrument operating as a general assignment for the purpose of obtaining benefits of its provisions. *Bromberg Bros. v. Heyer Bros.*, 22.

## ATTACHMENT.

1. *Attachment by landlord for rent or advances; what affidavit must show.*—The affidavit for an attachment by the landlord against his tenant for rent or advances, must state, (1) that the plaintiff is the landlord, and that the defendant is his tenant; (2) that there is, or will be due to the landlord from the tenant a debt or demand for a specified amount, for rent for the current year, or for advances, etc., one or both, and (3) that one of the grounds for attachment in such cases exists. These are jurisdictional averments, which the affidavit must contain; and failing in either of them, it is not amendable. *Fitzsimmons v. Howard*, 590.
2. *Same; when may be abated on plea for insufficiency of affidavit.*—An affidavit for an attachment by a landlord against his tenant for rent or advances, is fatally defective, when it fails to set forth the relation of landlord and tenant, either directly or by implication, and fails to aver a demand for the rent after the maturity of the debt; and an attachment issued thereon may be abated on plea. *Ib.* 590.
3. *Same; when plea in abatement sufficient on demurrer.*—A plea in abatement to an attachment which sets forth several defects in the affidavit, some of which are of substance, and others not, is not obnoxious to the rule, which requires that a plea in abatement shall be confined to a single matter of defense. Such defects do

ATTACHMENT—*Continued.*

- not constitute two defenses, but merely two grounds supporting one defense. *Ib.* 590.
4. *Rule to show cause why it should not be dissolved.*—An attachment having been issued on a cause of action, for which the issue of the process is not authorized by law, the mode of reaching the irregularity is by a rule for the plaintiff to show cause why the attachment should not be dissolved; and on the hearing of the rule the court should receive evidence showing the real nature and character of the demand sought to be enforced, in support, or for the discharge of the rule. *Rich v. Thornton*, 473.
  5. *When order dissolving may be set aside*—It is not irregular for a court to set aside during the term a judgment rendered by it, dissolving an attachment and dismissing the suit, without notice to the defendant; as it can not be assumed that the want of notice was prejudicial to him, the court having the authority to set aside such judgment despite any objections he could make. *Ib.* 473.
  6. *Refusal to quash not revisable.*—The refusal of the lower court to quash an attachment for defect in affidavit, is not revisable on appeal. *Ib.* 473.
  7. *When notary public may issue.*—Notaries public appointed to have and exercise the jurisdiction of a justice of the peace, can issue attachments returnable before themselves, to enforce the collection of debts, not exceeding in amount one hundred dollars. *Griffin v. Appleby*, 409.
  8. *Motion to quash attachment.*—A motion to quash an affidavit for defects apparent on the face of it, or a motion to quash a writ of attachment for similar defects, if made within the time prescribed for filing pleas in abatement, is addressed to the sound discretion of the court and may be entertained accordingly; or it may be refuse, and the party making the motion, put to his plea, as the court may elect. *Busbin v. Ware*, 279.
  9. *When affidavit by landlord for attachment defective.*—An affidavit by a landlord for the purpose of obtaining an attachment for rent and advances, which states, as a ground for attachment, that he "has good cause to believe said tenants are about to remove from the premises, or otherwise dispose of the crop without paying the amount which will be due for rent and advances," is fatally defective in failing to aver, that the contemplated removal of the crops from the premises of the landlord was without his consent; and a motion to quash the attachment issued thereon, made at the first term at which it could have been made, was properly allowed. *Ib.* 279.
  10. *Section 3606 of the Code construed.*—Section 3606 of the Code of 1876 requiring suits before justices of the peace to be brought in the precinct of the defendant's permanent residence, or in the precinct in which the debt was created, or in which the cause of action arose, is confined in its operation to suits commenced by summons, and has no reference to suits by attachment of goods, which are in their nature proceedings *in rem*. *Atkinson v. Wiggins*, 190.
  11. *Plea of former recovery; when sufficient.*—A plea of former recovery is good in bar of an action, commenced by attachment in the circuit court by a landlord against his tenant, for the recovery of rent, exceeding in amount the jurisdiction of a justice of the peace, which avers that after the commencement of the suit the plaintiff brought an action before a justice of the peace to recover \$100 for the identical cause of action; that the plaintiff and defendant both appeared before the justice, and thereupon judgment was rendered in said suit before him for the sum of \$100 and costs, and that the judgment was still of full force and vigor. *Davis v. Bedsole* 362.
  12. *Same.*—The former recovery thus pleaded is not affected by the fact

ATTACHMENT—*Continued.*

that the attachment before the justice was sued out after the commencement of the suit in which the plea was filed. *Ib.* 362.

## ATTACHMENT BOND.

1. *Its approval by the clerk.*—It is not necessary in an action on an attachment bond, for the plaintiff to aver that the bond had been approved by the clerk who issued the writ, as the obligors on the bond would be liable, if the bond was actually executed and delivered to the clerk, and by him received and filed, before he issued the process. *Dothard v. Sheid*, 135.
2. *Suit on attachment bond; sufficiency of complaint.*—Nor is it necessary in such action to aver, *ipsis verbis*, that the attachment was sued out *without cause*, as this is implied from the averment that the attachment was wrongfully sued out. *Ib.* 135.
3. *Same.*—Nor is it necessary in such action to aver that the attachment was levied on the plaintiff's property, as that is matter of evidence merely to establish the *quo modo*, and the *quantum* of damages. *Ib.* 135.
4. *Same; assignment of breaches; what sufficient.*—In an action on an attachment bond the breaches assigned were, 1st, that the attachment was wrongfully sued out; 2d, that it was vexatiously sued out; 3d, that it was maliciously sued out; 4th, that it was wrongfully and vexatiously sued out, and 5th, that it was wrongfully, vexatiously and maliciously sued out,—*held* that the assignments of breaches were insufficient. *Ib.* 135.
5. *Same; sufficiency of complaint.*—A complaint in such action, which is in substantial compliance with the form prescribed in the Code for suits on bonds with conditions (Code of 1876, § 3009, Form 12) is sufficient; but under such complaint, in the absence of specific averments claiming special damages, only general damages, or such as result necessarily and by implication of law from the issuance of the attachment, can be recovered. *Ib.* 135.
6. *Same; counsel fees; when recoverable.*—In an action on an attachment bond, whether brought for the recovery of the actual damages sustained, or for the recovery of vindictive or exemplary damages, reasonable and necessary counsel fees incurred in defending the attachment suit, or in prosecuting or defending an appeal from the judgment rendered in that suit to this court, may be recovered. *Ib.* 135.
7. *Same; must be specifically averred.*—Such fees, however, while the proximate result of the wrongful suing out of the attachment, are not such damages as necessarily result therefrom, or as are implied by law; and hence, they can not be recovered, unless they are specifically claimed in the complaint. *Ib.* 135.
8. *In suit on; record in attachment suit competent evidence.*—In an action on attachment bond the record of the attachment suit is admissible in evidence on behalf of the plaintiff. *Ib.* 135.
9. *In suit on; what competent evidence.*—Where one of the assignments of the breaches of the condition of the bond in a suit thereon, is that the attachment was vexatiously and maliciously sued out, it is competent for the plaintiff to prove, that after the writ was sued out, the defendant, at whose suit it was issued, told the plaintiff that he had more money to spend on the law-suit than the plaintiff had. *Ib.* 135.
10. *Action on attachment bond; what damages are too remote.*—In an action on an attachment bond, in which the only averment of special damage is, that "the plaintiff was engaged in the mercantile business, and had a good reputation, credit, business, and good customers; and that by, and in consequence of the levy of said attachment on his property and effects, his business, reputation and



ATTACHMENT BOND—*Continued.*

credit have been destroyed and lost, and his customers have withdrawn, to the loss and special damage of the plaintiff," etc., it is not competent for the plaintiff to show, that at the time of, and prior to the levy he was making advances to timber-men and others, and that thereby he had become interested in the handling of timber and crops, and that his mercantile business being stopped, he lost these advantages, and lost his advances and the shipment of his timber. Such matters are inadmissible, because there is no averment in the complaint authorizing them, and on the further ground, that if there had been such an averment, the damages claimed on account thereof, are speculative and too remote. *Pollock & Co. v. Gantt*, 373.

11. *Attachment sued out by agent ; for what damages the principal liable.* Where an attachment was sued out by an agent, and it is neither shown that he was thereunto authorized or instructed, nor that the principal ever repudiated the suit, this subjected the principal to actual damages, if no cause existed for suing out the process ; but he is not responsible for the malice, vexatious conduct, or wantonness of the agent, unless he caused, or participated in such evil motive or conduct. *Ib.* 373.
12. *When prior attachments admissible on trial of action on attachment bond.*—It is competent for a defendant to prove, for the purpose of affecting the recovery of exemplary or vindictive damages, that prior to the issuance of his attachment, his agent by whom it was sued out, had notice that other creditors of the plaintiff had, on that day, obtained attachments against him on the same ground as that alleged in defendant's attachment. But such testimony can not affect the actual damages which the plaintiff is entitled to recover. *Ib.* 373.
13. *Attachment ; when wrongfully sued out.*—No matter how well founded the belief of the attaching creditor, that a statutory ground exists for suing out the attachment, if he be mistaken or misinformed, and no ground in fact exist therefor, then the attachment is wrongful, and there may be a recovery of the actual damages sustained, which is measured by the actual injury which the issue and levy of the attachment occasioned. *Ib.* 373.
14. *General rules for the recovery of damages.*—Among the general rules for the recovery of damages are the following: (1). They must be the natural and proximate consequence of the wrong done, not the remote or accidental result; (2) special damages can be recovered only when they are not too remote, and are specially declared on and claimed in the complaint; and (3) what are termed speculative damages—that is, possible or even probable profits that, it is claimed, could have been realized, but for the tortious act or breach of contract charged against the defendant—are too remote and can not be recovered. *Ib.* 373.

## ATTORNEY AT LAW.

1. *Lien of attorney does not extend to lands which have been subject of suit.*—A solicitor who has successfully prosecuted a suit in equity to establish the title of his client to real estate, has no lien on such real estate, or his fees. *Hinson v. Gamble*, 65 Ala. 605, cited and approved. *McCullough v. Flournoy*, 189.
2. *The extent of his authority.*—An attorney at law is a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of his client. His authority to enter into bargains or contracts binding on his client, unless expressly conferred, is confined within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue,

ATTORNEY AT LAW—*Continued.*

levy and return of executions on judgments which he may have obtained. *Robinson v. Murphy*, 543.

3. *Same*; can not accept in satisfaction of judgment less than is due. An attorney at law, by virtue of his general retainer, has no authority to accept in satisfaction of a judgment which he has obtained for a client, a less sum than is actually due, or for such sum, to transfer the judgment. Either transaction would be in excess of his authority and would not bind the client. *Ib.* 543.
4. *Same*; one dealing with, must ascertain extent of authority.—All who deal with an attorney or other agent, must ascertain the extent of his authority; and if they do not inquire, they can claim no protection, because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising. *Ib.* 543.

See ATTACHMENT BOND, 6, 7.

## AUDITOR.

1. *Has no authority to waive payment of interest due from tax collector.* The auditor, in making a settlement with a tax collector, has no authority to waive payment of any interest which the collector may owe the State, or to release him from liability therefor. *The State v. Lott*, 147.

## BANKRUPTCY.

1. *Right of assignee, prior to adoption of Revised Statutes, to bring suit in State courts.*—Prior to the adoption of the Revised Statutes of the United States, the chancery courts of this State had jurisdiction to entertain a bill filed by an assignee in bankruptcy, to assail and set aside transfers of property made by the bankrupt in fraud of the rights of his creditors, or in fraud of the assignee as their trustee, or fiduciary representative. *Pollock & Co. v. Hill, Assignee*, 515.
2. *Same*; when jurisdiction of Federal courts exclusive.—Since the adoption of the Revised Statutes, June 22d, 1874, and the act amendatory of the bankrupt act of 1867, approved on same day, the jurisdiction of the Federal courts has been exclusive as to all actions instituted by an assignee in bankruptcy for the recovery or collection of the assets of the bankrupt, except in cases coming within the influence of the exception created by the amendment. *Ib.* 515.
3. *Same*; when State courts can take jurisdiction.—In such cases the State courts may take jurisdiction, under the exception created by the amendment, when the amount in controversy does not exceed five hundred dollars, and the Federal court in which the proceedings in bankruptcy are pending, has authorized or directed the assignee to sue in the State courts. *Ib.* 515.

## BILL OF EXCEPTIONS.

1. *When can not be altered or modified.*—A bill of exceptions having been signed by the presiding judge, becomes a part of the record in the cause to which it appertains, and can not subsequently be changed by oral evidence, unless the proposed change or modification is made prior to adjournment, while the matter is *in fieri*, or within the time agreed on by counsel in writing, authorizing such bill to be signed, pursuant to § 3113 of the Code of 1876. *Posey v. Beale*, 32.
2. *Proper practice in obtaining.*—The proper practice for a party desiring a true bill of exceptions to pursue, is for him to prepare a cor-

BILL OF EXCEPTIONS—*Continued.*

rect bill, in which the point or decision sought to be reviewed and the facts of the case are truly stated, and to tender it, within the proper time, to the presiding judge for his signature, requesting him to sign or refuse to sign it as prepared. If he fail or refuse, an application can then be made to this court to establish the bill of exceptions upon such evidence as may be deemed satisfactory. *Ib.* 32.

3. *Its office and what it should contain.*—The object of a bill of exceptions is to make the record speak what would not otherwise appear, touching any "charge, opinion or decision" of the court in which the court is supposed to have erred, to the prejudice of the party complaining; but it should not contain the process, pleadings or judgment of the court, as these are parts of every record and do not otherwise appear. The bill should also be signed by the presiding judge in such manner as to show that it was intended as a bill of exceptions. *Weems v. Weems*, 104.
4. *What is not a bill of exceptions.*—Where the caption of a record sent to this court on appeal, after stating the style of the case, the term of the court, and the name of the presiding judge, is in these words: "On the trial of this cause the following proceedings were had"; and then follow a motion to have counsel assigned to defend for the defendant, who was a *non compos*, the assignment of counsel, and then the process, pleadings and judgment-entry and the other proceedings in the cause, in consecutive order; to which is added the following words: "And the defendant's attorneys now assign each and all of the said rulings of the court as errors, (Signed) Wm. L. Whitlock," held, that this can not be regarded as a bill of exceptions, as it fails to express directly, or by implication, that it was so intended., *Ib.* 104.
5. *Error in charging upon effect of the testimony; when not shown.* Where the bill of exceptions does not purport to state all the evidence which was introduced on the first trial, this court can not affirm that the lower court erred in refusing a general charge upon the effect of the testimony, requested by one of the parties. *Tuttle v. Walker*, 172.
6. *Bill of exceptions; when recital shows that all the evidence is set out.* A recital in a bill of exceptions, that "the foregoing evidence being before the jury," the court gave certain charges therein set out, shows with sufficient certainty, that the evidence recited in the bill was, in substance, all that was introduced on the trial. *Alexander v. Wheeler*, 332.
7. *When the record of charges may be looked to, in aid of bill of exceptions.*—Where the bill of exceptions shows that exceptions were reserved to charges asked by appellant and refused by the court, but fails to show that such charges were moved for in writing, and it is shown by other parts of the record, that charges corresponding to those copied in the bill of exceptions, were asked in writing, and that the presiding judge had severally written "refused" on them and signed his name thereto, the bill of exceptions comes to the aid of such charges and shows that proper exceptions were reserved to the refusal thereof. *Mobile Savings Bank v. Fry*, 348.
8. *General exception to charge, what is, and its effect.*—When the general charge of the court enunciates distinct propositions of law, which are separable, one from the other, and consists of several paragraphs, which are neither numbered nor otherwise marked, so as to designate the parts into which the charge is divided, an exception thereto in these words: "To which charge the defendant excepted, separately and severally, and as a whole," is only a general exception to the entire charge, and can not avail, on appeal, unless each part of the charge is erroneous. *Smith v. Sweeney*, 524.



BILL OF EXCEPTIONS—*Continued.*

9. *General exception to the refusal of several charges unavailable, when one is incorrect.*—Where several written charges were asked, some of which were given and the others refused, an exception to the rulings of the court thereon in these words: "Which charges were refused by the court, and to which refusal the defendant excepted," is only a general exception to "a mass of charges refused," and the party excepting can take nothing thereby, if any one of the charges asserts an incorrect legal proposition. *Ib.* 524.
10. *Should be reserved on application for mandamus.*—The proper practice, where a party desires to review the refusal of inferior tribunal to award *mandamus*, is for the petitioner to reserve a bill of exceptions; and in the absence thereof, the case is not properly presented for the consideration of this court. *Ex parte Smith*, 528.
11. *When charge requested is presumed to be erroneous.*—Where the bill of exceptions fails to set out all the evidence, a charge requested by the appellant and refused by the court, will be presumed to be abstract, when it is not supported by the evidence which is set out in the bill of exceptions. *Pace & Cox v. The State*, 231.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange; when bona fide holder not affected by illegal consideration at common law.*—At common law, a *bona fide* holder of a bill of exchange, founded on a gambling consideration, which rendered the bill void as between the immediate parties, can not be affected by such illegal consideration. *Hawley v. Bibb*, 52.
2. *Bill of exchange founded on a loan or advance of money to bet as a wager; its validity.*—If a party employ a broker to make for him contracts for the delivery of cotton, and gives to such broker his acceptance of a bill of exchange to be discounted and used in making such contracts; and if at the time it was his purpose, as was known to the broker, neither to actually buy nor sell cotton, nor to receive or deliver it, but simply to stake margins to cover differences in price, and, on final settlement, merely to receive or pay the difference between the contract price and the market price at the time fixed by the contract for delivery,—the consideration of the bill of exchange would represent a loan or advance of money to bet or stake as a wager on the future price of cotton; and if the contract further contemplates that the money is to be advanced and loaned in this State, upon transactions to be made here, the bill of exchange would fall within the interdiction of the statute, and would be void in the hands of an innocent holder for value. *Ib.* 52.
3. *Consideration; parol evidence.*—In a suit at law on a promissory note, in which the consideration is stated, it is admissible to show by parol evidence a valuable consideration for the note, differing from that expressed therein. *Ramsey v. Young*, 157.
4. *Note payable one day after date; not an extension of debt.*—A note payable one day after date, given for an ascertained balance on a settlement of pre-existing demands, is not such an extension of the debt as will constitute a mortgagee in a mortgage executed contemporaneously with the note, and as security therefor, a purchaser. *Sweeney v. Bixler*, 539.

## BONDS.

1. *Bond of tax collector; failure to collect a breach of his official bond.* The duty of collecting the taxes is as imperative on the collector as is the duty of honestly accounting therefor, when collected; and a failure to collect, within the period prescribed by law, the taxes which, under the law, he is required to collect, is a breach of the condition of his official bond, equally with a failure to pay over the taxes when collected. *The State v. Lott*, 147.

BONDS—*Continued.*

2. *Same*; § 414 of Code of 1876 construed; when final settlement must be made.—Under section 414 of the Code of 1876, it is the duty of the collector, on or before the first day of May of each year, to make a final settlement with the auditor of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof; and a failure on his part to make such settlement and to pay over such balance on or before that day, whether resulting from his want of fidelity in accounting for the money collected, or from his want of diligence in collecting, is a breach of the condition of his official bond, casting upon the obligors the duty and liability of making compensation for any injury sustained therefrom by the State. *Ib.* 147.
3. *Same*; when interest recoverable.—Where a tax collector fails to make a final settlement with the auditor, on or before the first day of May, of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof, as required by section 414 of the Code of 1876, he and the sureties on his official bond are liable for interest from that day on the balance then due from him to the State on account of such taxes. *Ib.* 147.

See ATTACHMENT BOND.

BROKER. See AGENCY, 1, 2.

## BUILDING AND LOAN ASSOCIATION.

1. *The act incorporating The Montgomery Mutual Building and Loan Association, not violative of constitution.*—The act of the General Assembly entitled "An act to incorporate The Montgomery Mutual Building and Loan Association," approved February 11th, 1867 (Pamph. Acts, 1866-7, p. 408), had but one subject, which the title with clearness indicates, though it may not indicate the objects the corporation is designed to accomplish, or the powers with which it is to be invested, or the agency to be employed, or the mode to be pursued in exercising the powers. These are incidents necessarily pertaining to corporate existence—parts of the general subject expressed in the title. This act did not, therefore, offend such constitutional provision. *Montgomery M. B. & L. Ass'n v. Robinson*, 413.
2. *When purchase of advance or loan not usurious.*—Where, by act of the General Assembly incorporating a building and loan association, authority was given to expose to sale, at each monthly meeting of the association, the amount paid into the treasury, at public outcry to the highest bidder among the members, each of whom was authorized, for each and every share of stock held by him, to purchase an advance of two hundred dollars and no more; and the stockholder purchasing such loan or advance, was thereby required to allow the premium at which he had bid in such advance or loan, to be deducted, and to give his note for the amount of such advance, and to pay, in addition to the monthly dues required from all members, one dollar and thirty-three and one-third cents per month for each share of stock, or at the rate of eight per cent. *per annum*, on the whole amount, including the premium,—such a transaction, having legislative sanction, is free from usury. *Ib.* 413.
3. *Provisions of charter construed.*—Under a provision in the charter of a building and loan association, enacted by the General Assembly, that, in the event of the death of a stockholder, who had obtained an advance, his heirs or legal representatives were entitled to continue the relation of stockholder, the death of a member operates a dissolution of his membership, terminating his connection with

BUILDING AND LOAN ASSOCIATION—*Continued.*

the association; and upon his heirs or devisees, and not upon his personal representative, is conferred the privilege of succeeding to, or continuing the membership. And if such privilege is exercised by the heirs or devisees, they become members, not in a representative capacity, but in their own right; and they are subject individually to the duties and liabilities of membership.

*Ib.* 413.

4. *Same.*—Where the charter of such association further provides, that, if the heirs or devisees were unable or unwilling to continue the membership of a deceased stockholder, who had obtained a loan, or advance, the association is required to act as if default had occurred while the stockholder was living, and it also provides that a stockholder may redeem his property mortgaged to secure such loan or advance, by payment of such a sum of money as would, at the rate of premium at which the corporate funds were selling at the time of redemption, produce the same monthly interest as that which the stockholder had been paying on the advance, in no event being less than the net sum advanced,—the association can not neglect or delay indefinitely the foreclosure of the mortgage, and thus suffer dues, interest and fines to accumulate, increasing the mortgage debt and burdening the equity of redemption; but it must proceed to a foreclosure of the mortgage. *Ib.* 413.
5. *Same.*—In such case, the liability of the mortgaged premises is the same amount that could have demanded of the decedent, if, at the instant of his death, he had offered to redeem. *Ib.* 413.
6. *What by-laws valid.*—By-laws adopted by a corporation organized as a building and loan association, under Art. 7, Chap. 1, Title 2, Part 2, of the Code of 1876, providing that loans of the money in the treasury shall, at stated times, at meetings of its members, be sold at public outcry to the highest bidder; that the premium bid shall not be less than \$1.00 per share per month; that the shareholder bidding the highest premium shall be entitled to receive as a loan the full amount of \$200.00 per share for each share held by him; that the borrower shall pay interest on such loan at the rate of six per cent. per annum, payable monthly, and also the premium at which he bid in such loan, such premium also payable monthly,—are authorized by the statute under which the association was incorporated. *Security Loan Association v. Lake*, 456.
7. *When premiums on loans not usury.*—When the legislature authorized corporations incorporated under the general law, as building and loan associations, to sell loans of its funds to the shareholders at the highest bid, that body thereby authorized such corporations to demand and recover whatever premium the purchaser bound himself to pay; and the transaction, being thus legalized, is taken out of the operation of the statutes against usury. *Ib.* 456.
8. *How member can withdraw and have loan cancelled.*—A by-law of such corporation, providing that a shareholder, who has obtained a loan, may withdraw from the association and have his loan cancelled, by payment to the association of the amount of the loan, less the amount of money which he has paid in as monthly installments on the stock held by him, reserves to the shareholder a privilege which he may exercise or not, at his pleasure. If he elect to exercise it, he must comply with the terms thereby prescribed, which were voluntarily assumed by him, when he obtained the loan. Under this by-law, the shareholder is entitled to have his loan credited with the money which he has paid in as monthly installments on his stock, but not with money which he has paid for and on account of the premiums at which he bid in his loan. *Ib.* 456.



## BURGLARY.

See CRIMINAL LAW.

## CANCELLATION OF DEEDS.

See CHANCERY.

## CARRYING CONCEALED WEAPONS.

See CRIMINAL LAW.

## CHANCERY.

## I. JURISDICTION AND GENERAL PRINCIPLES

1. *When courts of equity will not re-open decrees of courts of probate.* In the absence of facts and circumstances showing that a decree of the court of probate is inequitable, of which the party complaining could not have availed himself in that cause, when the decree was rendered, and that he is without fault or neglect, a court of equity can not re-open the litigation the decree was intended to close. *Lowe v. Guice*, 80.
2. *Same.*—After the confirmation by the court of probate of the sale of lands by an administrator under former decree of that court, mere inadequacy of the price for which the lands were sold is not a sufficient ground to authorize a court of equity to intervene to vacate the sale, there being an absence of all unfairness, and the parties interested not being surprised. *Ib.* 80.
3. *Divorce in favor of the wife; degrading charges against her, without violence, no ground for.*—Charges made by the husband against the wife, although degrading and humiliating in their character, are not, by themselves, sufficient to authorize a divorce under section 2687 of the Code; but there must be actual violence inflicted on the person of the wife, attended with danger to her life or health, or such conduct on the part of the husband as generates a reasonable apprehension of such violence. *Folmar v. Folmar*, 84.
4. *Same; when insulting or offensive language competent evidence.*—If, however, in such case, there is proof of personal violence, actual or threatened, insulting or offensive language is competent evidence in aid of it. *Ib.* 84.
5. *Bill in equity to enjoin action at law and to remove cloud from title; when it will be entertained.*—In this case the bill was filed by judgment creditors who had redeemed lands sold under a power contained in a mortgage from the purchaser, and had been let into possession, to enjoin an action of ejectment brought against them by alienees of the mortgagor, his daughters, claiming under a deed executed prior to the mortgage, reciting a valuable consideration, but which was not recorded until after the mortgage was executed, and more than three months after its execution; and to have the deed declared fraudulent and void, and cancelled as a cloud upon the complainants' title. The bill also charges, and the evidence tends to prove, that the deed was voluntary, and fraudulent. *Held*, that the bill contained equity, and the complainants were entitled to an injunction of the suit at law, and a cancellation of the deed as a cloud upon their title. (STONE, J., dissenting.) *Lehman, Durr & Co. v. Shook*, 486.
6. *Cloud upon the title; jurisdiction of court of equity to remove.*—While it is true that the jurisdiction of a court of equity can not be invoked, when the sole ground of equitable interference is the removal of a cloud from the title, unless the complainant is at the time in possession, the rule is different, when other distinct grounds of jurisdiction are averred. In such case, the court, having assumed jurisdiction for one purpose, will retain it, that the whole

CHANCERY—*Continued.*

- litigation may be settled, and complete justice be done between the parties. *Shipman v. Furniss*, 555.
7. *Same*.—Hence, a court of equity will entertain a bill filed to have a deed cancelled, the execution of which is shown by proper averments to have been procured by fraud and undue influence, notwithstanding the fact, that the complainant is out of possession. *Ib.* 555.
  8. *Parties bearing towards each other confidential relations ; dealings between*.—The rule, that dealings between parties bearing towards each other confidential relations will be jealously watched by the courts, is not confined to relations strictly fiduciary, but extends to "all the variety of relations in which dominion may be exercised by one person over another." *Ib.* 555.
  9. *Undue influence ; when inferred*.—While undue influence is a species of constructive fraud which the courts will not undertake to define by any fixed principles, its exercise may be inferred in all cases of confidential, or *quasi* confidential relations, where the power of the person receiving a gift, or other like benefit, has been so exercised over the mind of the donor as, by improper arts or circumvention, to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion. *Ib.* 555.
  10. *Same ; burden of proof*.—Where one, living in illicit sexual relations with another, gives to such person property of considerable value, especially where the donor, in making the gift, excludes natural objects of his bounty, the transaction will be viewed by a court of equity with such suspicion, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. *Ib.* 555.
  11. *Same ; when deed obtained by*.—Where a young man, addicted to strong drink and lewd dissipation, the excessive indulgence in which had impaired both his mind and body, executed a deed of gift conveying a large and valuable tract of land, constituting substantially all his property, to a common prostitute, who had and exercised over him a strong influence, and with whom he had been living for some time as his wife under a marriage ceremony which was void by reason of her prior marriage with another who was still living, the grantor thereby preferring her to the exclusion of his own blood relations, the transaction not only challenges the duty of the courts to watchfulness and jealousy in scanning the circumstances under which the deed was executed, but is persuasive to impress the judicial mind with a conviction, that the will and judgment of the grantor were brought under illegitimate constraint in producing so unnatural a result. *Ib.* 555.
  12. *Same*.—In such case, if the donor executed the deed with an honest belief that his marriage with the donee was lawful and valid, he executed it under a false and fraudulent hypothesis, and, for this reason, the deed could be avoided, as having been procured by artifice, circumvention and fraud. *Ib.* 555.
  13. *Deed to grantor's paramour ; when void*.—And if he was aware of the illegality of his marriage, the deed must be construed, under all the facts of the case, to have been made in contemplation of the continuance of their adulterous intercourse, thus presenting the case of an executed contract, founded upon an illegal consideration, against which a court of equity will grant relief, when, by undue influence, the donee has procured its execution. *Ib.* 555.
  14. *Specific performance ; indebtedness on other accounts no defense*.—Specific performance of a contract can not be resisted, by showing that the complainant is indebted to the defendant on other accounts, which are not connected with the contract, of which specific performance is sought. *Right v. Luke*, 423.

CHANCERY—*Continued.*

15. *Specific performance of contract for conveyance of land ; what debts may be set up in defense of.*—L. purchased of B. a tract of land situate in this State for \$5000, and gave his notes for the purchase-money, B. executing a bond to make title on payment of the notes. L. then sold and conveyed to B. a tract of land situate in Georgia for \$2000, and this sum was by agreement applied to the payment for the lands which B. had sold to L. At the time of this last sale K. held a mortgage on the Georgia lands, executed to him by L. to secure \$500 and accrued interest ; and afterwards K. acquired another claim against L. for \$100, and also became the owner of the notes which L. had given to B. for the Alabama lands, on which was entered the credit of \$2000. Before K. had acquired these notes, he had made an agreement with L. to purchase from him two parcels of the lands sold by B. to L. at an agreed price for each. The three parties, B., L. and K., then came together, and L. executed his note to K. for \$700, payable in cotton, in consideration of the \$500 note secured by mortgage on the Georgia lands, and of the other debt of \$100 which K. had acquired ; and thereupon, by agreement between the parties, B. conveyed the lands which L. had purchased from him to K., and K. went into possession of the two parcels which he had purchased from L. and the latter retained possession of the balance. In a bill filed by L. against K., it is averred that the price of the two parcels which the latter had purchased from the former, should be credited on the balance due on the purchase-money notes given to B., then held by K., and that B. had executed the deed to K. on the agreed condition that when L. had paid such balance, K. was to convey all the lands to L. except the two parcels purchased by him from L. The bill also avers the payment of such balance, and prays a specific performance of the contract to convey. In answer to the bill K. averred that the deed was made to him by B., not only to vest title in him to the two parcels which he had purchased from L., but also as security for the balance due on the purchase-money notes given by L. to B. then held by him, and for the payment of the said \$700 note, payable in cotton ; and that no part of said debts had been paid. He further averred that he had not credited on the purchase-money notes the amounts he had agreed to pay for the two parcels purchased from L. because of certain damages alleged to have been sustained by him by reason of misrepresentations made by L. to him touching the location of, and number of acres contained in, one of the parcels so purchased by him. The cause having been heard on bill and answer, the chancellor caused to be entered a decree of reference, directing the register to confine the evidence and the account to the inquiry of what was due and unpaid on the purchase-money notes given by L. to B. *Held,*
- (a) That the chancellor erred in thus confining the evidence and account.
  - (b) That, if the averments contained in the answer be true, the note for \$700 was not an outside or independent transaction, but was so connected with the contract for the conveyance of the land, that the complainant will be required to pay it before he can coere specific performance.
  - (c) That if the defendant can prove the misrepresentations in reference to the quantity and boundaries of the land purchased by him from the complainant, as alleged in his answer, then, to the extent he was injured thereby, he would have the right to have the price agreed to be paid therefor abated, and thus increase the balance due on the purchase-money notes given by the complainant to B.
  - (d) That if the averments of the answer be true, the complain-



CHANCERY—Continued.

ant can obtain no relief without amending his bill, so as to correspond with the facts.

16. *Vendee under contract of purchase, the equitable owner.*—When a valid contract for the purchase of lands has been made, the vendor covenanting to make title on the payment of the purchase-money at a future day, a court of equity, acting on its maxim of treating that as done, which the parties contemplate shall be done in the final execution and consummation of the contract, regards, for most purposes, the contract as specifically executed, and considers the vendor the owner of the purchase-money, and the vendee as the equitable owner of the land, attaching to the land a trust in favor of the vendee, which not only binds the land while the legal estate remains in the vendor, but which also binds every one claiming under him, except a *bona fide* purchaser without notice. *Wimbish v. Montgomery B. & L. Association, 575.*
17. *When a court of equity will enforce the interest of a cestui que trust growing out of a voluntary agreement.*—While a court of equity will not, as a general rule, aid a mere volunteer in the enforcement of an executory agreement, nor upon such an agreement, unsupported by a valuable consideration, will create a trust, and establish the relation of trustee and *cestui que trust*; yet, if the trust is actually created, is effectually constituted, it is irrevocable, and a court of equity will enforce the equitable interest of the *cestui que trust*. *Ib. 575.*
18. *When a party is a mala fide purchaser.*—The settled doctrine of a court of equity is, “that the person who purchased an estate (although for a valuable consideration), after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.” *Ib. 575.*
19. *Purchase of real estate by husband in the wife's name; interest therein.*—If on the purchase of land by the husband, he take a bond for title in the wife's name, whereby the vendor covenants on payment of the purchase-money at a future day, to make title to her, she is thereby invested with an equity in the land, which is irrevocable and indestructible by any subsequent act of the husband, and which, on payment of the purchase-money, becomes perfect and entitles her to a conveyance of the legal title. And if, on payment of the purchase-money by the husband, though with his own funds, he deliver up the bond for title, and at his request, but without the wife's knowledge or assent, the vendor convey the legal estate to a third party, who, in turn, conveys it to another in mortgage to secure a loan then made, nominally to the mortgagor, but, in fact, for the use and benefit of the husband, all parties having full notice of the wife's equity, such mortgagee, although a purchaser for a valuable consideration, takes the legal title *mala fide*, and will not be allowed thereby to defeat the wife's prior equitable estate. *Ib. 575.*
20. *Damages for breach of contract; when a court of equity will decree.* As a general proposition, courts of equity will not entertain suits, the sole object of which is compensation for breaches of contract; but when the court has acquired jurisdiction, as incidental to other relief, or if a peculiar equity intervenes, such compensation may be decreed. *Hooper v. Savannah & Memphis R. R. Co., 529.*
21. *Relation of vendor and vendee; special contract construed as creating; specific performance of contract.*—Where a railroad company, having constructed its road-bed through a city lot, without having first made just compensation therefor, entered into a written contract with the owner, by which the company stipulated to pay him

CHANCERY—*Continued.*

a stated amount in cash, and further, to do and perform certain work on specified streets contiguous to the lot and necessary to access to, and egress from it, where they were intersected by the railroad, within a given time, and under a prescribed penalty; and in return the owner was to give the company the right to run their road through the lot on the bed as graded, with a right of way to the extent of twenty-five feet from the center of the road-bed, and also the right of the use of another designated part of the lot, the owner retaining the legal title; and the company, having made the cash payment, failed to do the stipulated work on the streets,—*held*,

(a). That the contract being construed in view of the relation of the parties and of their rights and liabilities—a land-owner whose property was liable to be taken for public uses, and a corporation having authority to take and acquire it for such uses—the payment to the owner of the compensation he was entitled to receive, partly in money, and partly by the performance of the stipulated work on the streets, where intersected by the railroad, obstructing access to the lot and impairing its value, was the purpose intended to be accomplished by the parties.

(b). That, under the contract, the relation of the parties is that of vendor and vendee, the vendor having a lien on the rights in the lot acquired by the vendee, for the unpaid balance of the consideration therefor, which is the diminished value of the lot caused by the obstruction or interruption of access to it by the railroad intersecting the streets; and that a court of equity has jurisdiction to enforce this lien.

(c). That a court of equity also has jurisdiction to enforce the specific performance of the contract, and, as incidental thereto, to decree compensation for any damages suffered by the owner from the failure of the company to do the work stipulated.

(d). That the legal title not having passed by the contract, but having been retained by the vendor, the company's title was, at most, merely equitable; and a mortgagee of the company, being chargeable with notice of the nature and character of the right, title and possession of the company, can not be regarded as a *bona fide* purchaser for a valuable consideration, without notice; but he only succeeds to the equitable right or title of the company and takes it *cum onere*. *Ib.* 529.

22. *Deposit of title deeds to lands as security, void under statute of frauds.* The doctrine of the English Court of Chancery, that a deposit of the title deeds to lands for security of a debt is an equitable mortgage, is in violation of the statute of frauds, and can not be maintained in this State. *Lehman, Durr & Co. v. Collins*, 127.
23. *Bill to enforce vendor's lien; abatement of damages resulting from breach of warranty.*—The measure of damages for a breach of a warranty in the sale of lands, on eviction under an outstanding paramount title, is the purchase-money, or consideration, with interest, and the costs of the ejectment suit; and on a bill filed to enforce the vendor's lien for an unpaid balance of the purchase-money, an abatement of the amount of such damages may be allowed. *Kingsbury v. Milner*, 502.
24. *Same*—A bill filed to enforce a vendor's lien for an unpaid balance of purchase-money against the vendee, who holds the vendor's deed with warranty, or a bond for title, is entirely devoid of equity, when it shows by its averments, that the vendee had suffered damages by reason of an eviction under an outstanding paramount title, in an amount exceeding the amount claimed in the bill. *Ib.* 502.
25. *Bill to enjoin sale under power; when without equity.*—A bill filed by a mortgagor seeking an account of the amount due on the mort-

CHANCERY—*Continued.*

- gage debt, and an injunction of a sale of the property conveyed by the mortgage, under a power therein contained, is without equity, when it does not show, that the mortgagee claimed more than was due on the debt; or that the accounts are so complicated, that the parties can not state them and ascertain the amount due; or that the mortgagee is making, or attempting to make, a fraudulent or oppressive use of the mortgage, or of the power of sale contained therein. *Security Loan Ass'n v. Lake*, 456.
26. *Bill carrying into execution former decree; when it will be entertained.* A court of equity will entertain a bill to carry into execution a decree it has pronounced, when it appears that from some neglect of the parties "to proceed upon the decree, their rights have been so embarrassed by subsequent events, that no ordinary process of the court upon the first decree will serve; and it is, therefore, necessary to have another decree of the court, to ascertain and enforce them." *Griffin v. Spence; Adm'r*, 393.
27. *Same; when may be filed by party defendant to original suit.*—After the rendition of a decree, by which the rights of the parties are ascertained, both complainants and defendants being equally entitled to the benefit thereof, a defendant who has an interest in the execution of the decree, or who has rights involved which requires a revivor, will be allowed to revive it by bill filed for that purpose. *Ib.* 393.
28. *Same; in what court should be filed.*—A bill to revive and enforce a decree, is auxiliary and supplemental in its nature; and, in order that the unity of the proceedings may not be destroyed, it must be filed in the court in which the decree was rendered. *Ib.* 393.
29. *Writ of assistance; jurisdiction of courts of equity to issue.*—A court of equity has authority, both by virtue of its common law jurisdiction and under the express provisions of the statute, to issue writs of assistance or possession, for the purpose of enforcing its orders and decrees; and in the exercise of this power, it can compel the delivery of the possession of land sold under its decrees, by any of the parties to the suit, by persons coming into possession *pendente lite*, or by mere naked trespassers. *Hooper v. Yonge*, 484.
30. *Same; exercise of the authority to issue discretionary.*—But authority to issue writs of assistance is largely discretionary, and will not ordinarily be exercised without application supported by affidavit, showing due service of the decree sought to be enforced, and that it had not been obeyed; and, according to the better practice, notice of the motion for the issuance of the writ should be given to the adverse party. *Ib.* 484.
31. *Same; when should be refused.*—The remedy afforded by the writ of assistance being summary in its character, the writ should be refused by the court, where a purchaser, seeking its aid to enforce the delivery of the possession of lands purchased by him under the decree of the court, has suffered several years to elapse after his purchase before filing his application for the writ, thus creating the reasonable presumption, that the party in possession holds as tenant of the purchaser, or under other like claim of right, which is negated by the averments of the petition, or by any proof. *Ib.* 484.
32. *Bill to enjoin sale under mortgage; when cross bill not necessary to support decree of sale for payment of mortgage debt.*—Under a bill filed by a mortgagor seeking to enjoin a sale of property conveyed by mortgage under a power contained therein, on the grounds of usury and payment, and offering to pay whatever sum might be adjudged to be due on the mortgage debt, and submitting himself to the jurisdiction of the court, a court of equity, deriving jurisdic-



CHANCERY—*Continued.*

- tion from such offer and submission, has adequate power, without a cross bill, to decree a sale of the mortgaged premises for a payment of the mortgage debt, unless the same is paid by the mortgagor within the time specified in the decree. *Mooney v. Walter*, 75.
33. *Settlement by trustee of debt due the trust.*—A settlement by a trustee of a debt due to him as such trustee, whereby he accepted a conveyance of property by the debtor, in payment of the debt, is, at most, only voidable, at the election of the *cestuis que trust*. This right of election is personal to them, and can not be exercised for them by other creditors of the debtor, who seek to set aside the conveyance, and to appropriate to themselves the property conveyed, to the exclusion of the debt, in which the *cestuis que trust* have the beneficial interest. *Chamberlain & Parker v. Dorrance*, 40.
  34. *Vendor's lien for unpaid purchase-money ; when it exists, and against whom enforceable.*—A vendor of lands, who has not taken security, although he makes an absolute conveyance, with a formal acknowledgment that the consideration is fully paid, retains an equitable lien for the payment of the purchase-money, which will be enforced against the vendee and all persons claiming under him, other than *bona fide* purchasers without notice. *Wilkinson v. May*, 33.
  35. *Vendor's lien ; party disputing must show it has been displaced or waived.*—Such lien, not being dependent upon a specific agreement for its creation, but existing independently thereof, and resting on the broad principle of equity, that one man ought not, in good conscience, to get and keep the estate of another without paying the consideration money, whoever resists the enforcement of the lien assumes the burden of proving that "it has been intentionally displaced or waived by the consent of parties ; and if, under all the circumstances, it remains in doubt, then the lien attaches." *Ib.* 33.
  36. *Simple contract creditors ; provisions of sections 3886 and 2126 of the Code may be enforced by them.*—Section 3886 of the Code confers on simple contract creditors without liens, the remedy which was formerly accorded only to judgment creditors, of filing a bill to set aside a conveyance or sale made with intent to hinder, delay or defraud creditors. Such creditors also have the right to assail, by bill in equity, a general assignment for the purpose of claiming the benefit of section 2126 of the Code. *Bromberg Bros. v. Heyer Bros.*, 22.
  37. *Bill of review ; its object and effect.*—The object and effect of a bill of review, when filed because of error apparent, or because of newly discovered evidence pressing upon the matter in issue in the former suit, are the reversal of the decree, so far as it is erroneous, and to retry the cause upon the original record in the one case, or, in the other, upon the original and new proof. *McCall v. McCurdy*, 65.
  38. *Same ; its averments and prayer.*—In bill of review for error of law apparent on the record, if the decree has not been carried into execution, the proper prayer is simply that the decree may be reviewed and reversed ; but if the decree has been executed, the facts touching the execution thereof should be stated, and the prayer of the bill should be for the further decree of the court, that the party complaining may be put in the condition in which he would have been, if the decree had not been executed. *Ib.* 65.
  39. *Same ; difference in remedy thereby afforded from that of writ of error or appeal.*—A bill of review for error apparent, and a writ of error or an appeal, under our system, are not concurrent and co-extensive remedies. The errors which will support the former, are also

CHANCERY—*Continued.*

- available under the latter; but there are many errors and irregularities, which will work a reversal on error or appeal, that will not support a bill of review. *Ib.* 65.
40. *Same; what errors will support.*—A bill of review can not rest merely on strict law, on errors of form, or mere irregularity of proceeding; but, in order to sustain such a bill, there must be error of substance, error in the conclusions of the court on matters of law affecting the rights of the party complaining, and it must be apparent that he has suffered injury from the error. *Ib.* 65.
41. *Same; assignment of errors.*—It is the settled practice, that, in a bill of review for errors apparent, the errors relied on for a reversal must be distinctly pointed out; and that none, other than those specifically assigned, will be noticed or considered. *Ib.* 65.
42. *Same; what error will not support.*—The personal representative of the deceased mortgagor is a necessary party to a bill to foreclose, unless it is affirmatively shown that the personal assets can not, in any event, be made liable for any part of the mortgage debt; and the failure to make him a party may be taken advantage of by the heirs, by demurrer on the hearing, or on appeal; but it would not be error on which to found a bill of review, at their instance, unless it is shown, that the non-joinder has injuriously affected their rights. *Ib.* 65.
43. *Appointment of administrator ad litem nugatory prior to statute authorizing it.*—The appointment of an administrator *ad litem* prior to the passage of the statute authorizing it, was nugatory, and conferred no right upon the party appointed to represent the decedent, of whose estate he was appointed such administrator. *Ib.* 65.
44. *Infant defendants; when process can be served on their mother for them.*—When the widow of a deceased mortgagor is made a party to a bill for foreclosure, because an assignment of dower to her is prayed, her interest is not adverse to that of the infant heirs; and process for them, they residing with her, was, in such case, properly served on her under the former rule of practice. (Rule 20, Rev. Code, p. 825). *Ib.* 65.
45. *Appointment of guardian ad litem: must affirmatively appear on appeal, but not so, on a bill of review.*—A decree against an infant will be reversed on error or appeal, unless the record affirmatively shows the appointment of a guardian *ad litem* for him, and such appointment will not be inferred from the fact that an answer was filed by a person styling himself guardian *ad litem*; but when the record shows, that an answer was filed, and defense made, by a person acting as guardian *ad litem*, the failure of the record to show his appointment by the court, is not an error which will support a bill of review. *Ib.* 65.
46. *Decree of foreclosure in mortgaged lands descended to infants; when error in will not support a bill of review.*—When lands, mortgaged by the ancestor, have descended to infants, it is error to render a decree of foreclosure and sale of such lands, when susceptible of division, without an inquiry by the register, upon a reference, whether a sale of the entire premises, or of a part only, is necessary, and if of a part only, what part it would be most beneficial to them to sell; and this error would reverse the decree on appeal; but it is not such an error as will support a bill of review, where it does not appear that any real injury was done to the infants by the omission to order the inquiry. *Ib.* 65.
47. *Surety of an executor; when equity of is subordinate to rights of alienees of principal in lands devised by testator.*—A surety of an executor, who has paid a judgment rendered against them, both principal and surety, on a debt due by the testator, and has taken an assignment thereof to himself, may, by bill in equity, alleging

CHANCERY—*Continued.*

the insolvency of the executor, (such executor being also a devisee under the will of the testator), reach and subject the individual interest of such executor in lands devised by the testator, so long as such executor remains the owner thereof. But when it is shown that such executor has aliened to others the lands devised to him, upon considerations not assailed, and has thus parted with his interest therein, without fraud, the alienees have not only the legal estate in such lands, but also an equity equal, at least, to any equity that can be preferred by the surety. *Vanderveer v. Ware*, 38.

See BANKRUPTCY.

## II. PLEADING AND PRACTICE.

## I. BILL AND PARTIES THERETO.

48. *Right of legatees or distributees to sue in respect to personal assets.* In respect to the personal assets of a decedent's estate, distributees or legatees, as a general rule, can not sue any other person than the executor or administrator, because there is a want of all proper privity between them and persons who may have possession of personal assets, or may have converted them, or, when the assets are in the form of debts, between them and the debtors. *Costephens v. Dean*, 385.
49. *Same.*—There are exceptional cases, however, in which this court, venturing beyond established precedents and decisions, has dispensed with the presence of a personal representative, and permitted the next of kin to sue, or distribution to be made to them directly; but in each of these cases there existed some special facts, indicating clearly that there was no necessity for an administrator, that if one was appointed, his only duty would be to receive with one hand, and with the other make distribution; or that without administration, the parties in interest being adults, had made division themselves. *Ib.* 385.
50. *When distributees can not maintain bill in equity to enforce vendor's lien.*—But where the decedent was, at the time of his death, an adult citizen of this State, his distributees can not maintain a suit in equity to enforce a vendor's lien for unpaid purchase-money of lands sold by him, upon the sole averment that he died about thirteen years before the filing of the bill, leaving no debts, and that no administration had ever been had upon his estate. *Ib.* 385.
51. *Bill by distributees in respect to personal assets; when widow should be made a party.*—If such a suit could be maintained by distributees, the widow, being entitled to share in the personal assets, should be made a party to the bill; and the failure to make her a party is fatal on demurrer to the complainants' right of recovery. *Ib.* 385.
52. *Bill to enforce vendor's lien; who proper parties.*—Neither the personal representative nor the heirs of the deceased husband are proper parties to a bill filed by the wife to enforce a vendor's lien on lands, which was assigned to her by the husband with the unpaid purchase-money, they having no right or interest in the subject-matter of the suit. *Wilkinson v. May*, 33.
53. *Same; when original purchaser not a necessary party.*—The original purchaser of land is not a necessary or indispensable party to a bill filed to enforce a vendor's lien thereon for the unpaid purchase-money, when it is shown that he had parted with all interest in the land, and his vendee had succeeded thereto. *Ib.* 33.
54. *Necessary parties.*—To constitute one a necessary or indispensable party to a bill, in whose absence the court will not proceed to a final decree, he must have a material interest in the issue, which will necessarily be affected by the decree. *Ib.* 33.



CHANCERY—*Continued.*

55. *Fraudulent conveyance; when sub-purchaser thereunder a necessary party to bill filed by creditor to condemn lands conveyed thereby.*—A creditor seeking to have set aside as fraudulent and void a deed to lands executed by the debtor, and to have the lands sold for the payment of his debt, can not condemn and have sold a part of the lands, which a third party had purchased from the parties to the deed, and of which he had taken possession under his purchase, without making such purchaser a party to the bill, although it is not shown that the purchaser had paid for the lands, or that he had received a conveyance thereof. *Jones v. Wilson, Adm'r, 400.*
56. *Rule as to recovery.*—The rule is well settled in equity, that all the parties complainant, who join in a suit, must be entitled to recover, or none can. The failure of one is the failure of all. *Taylor, Adm'r, v. Robinson, Adm'r, 269.*
57. *Usury; how pleaded.*—A party who has made usurious payments on a debt and seeks, by bill in equity, to obtain credit for such payments, must distinctly and correctly set forth in the bill the terms and nature of the usurious agreement and the amounts of the payments which he has made thereon. Under this rule, the averments of the bill in this cause are wholly insufficient to raise the question of usury. *Security Loan Association v. Lake, 456.*
58. *When averments of bill not repugnant.*—Where in a bill filed to have a deed to lands declared void as obtained by fraud and undue influence, and cancelled as a cloud upon the title, it is shown, by appropriate averments, that the grantor's signature was obtained by fraud and undue influence, and that the deed was recorded, and the grantee was in possession, claiming under it, there is no objectionable repugnancy in averments touching the delivery of the deed, one of which, based on information and belief, is, that the deed was never in fact delivered, and was for this reason inoperative; and the other is, that if complainant is mistaken in this, and the deed was delivered, its delivery was procured by the fraud and undue influence, which induced the grantor to sign it. *Shipman v. Furniss, 555.*
59. *Bills may be filed in a double aspect.*—Bills in equity, as originally filed, or as subsequently amended, may present the complainant's case in a double aspect, or, as it is usually expressed, in the alternative. But, when a bill is so framed, in order to prevent surprise, embarrassment of the defendant in making defense, and the inextricable confusion which would follow from blending in one suit distinct causes of action, the rule is strictly observed, that each aspect or alternative must entitle the complainant to the same relief. *Rapier v. Gulf City Paper Co., 476.*
60. *Bills in a double aspect; when not demurrable.*—A bill seeking an adjustment of conflicting liens on personal property of a debtor, and a sale thereof, and presenting the complainant's right to relief in a double aspect, is not demurrable, when, in one aspect, the complainant bases his right to relief on a transfer and assignment of the personal property as security for a debt owing to him by the debtor, and, in the other aspect, he seeks relief as a judgment creditor of such debtor, the relief to which the complainant is entitled in either aspect being substantially the same. *Ib. 476.*
61. *Bill to redeem; what is a sufficient offer to do equity.*—An averment in a bill, filed by a mortgagor, to redeem real estate conveyed by a mortgage, executed to secure a loan made under the by-laws of a corporation organized, as a building and loan association, under the general law, that "orator is still willing, and now offers to pay said association whatever amount he may be justly chargeable with, if any, upon the application to his said case of the terms" of the by-laws under which the loan was made, "and in this re-

CHANCERY—*Continued.*

- spect submits himself to the order and decree of this Hon. Court," is a sufficient offer to do equity to entitle complainant to relief, if his bill is otherwise sufficient, although no tender is averred, and the money is not brought into court. *Security Loan Association v. Lake*, 456.
62. *Fraud; how pleaded.*—Fraud is a mere conclusion of law from facts stated and proved; and when it is pleaded, at law or in equity, the facts from which it is supposed to arise, must be clearly stated, in order that the court may determine whether they constitute fraud. A mere general charge of fraud, or a mere general averment, that an act was done with covinous intent, is not sufficient. *Chamberlain & Parker v. Dorrance*, 40.
63. *When averments too vague and uncertain.*—A creditor seeking to have a mortgage executed by his debtor declared a general assignment, on the ground that it conveys substantially all the debtor's property, must show by his bill, that his debt existed at the time of the execution of the mortgage. An averment, that "a large portion of the debt existed prior to" the date of the mortgage, is too vague and uncertain to entitle him to participate in the security afforded by it. *Danner & Co. v. Brewer & Co.*, 191.
64. *Offer to redeem; absence from the State of party to whom it should be made, dispenses with necessity therefor.*—The absence of the party to whom an offer to redeem and tender should be made, dispenses with the necessity of such offer and tender before filing the bill. In such case, the statute is complied with, if the offer and tender are made in the bill, filed within two years. *Lehman, Durr & Co. v. Collins*, 127.
65. *Bill to revive and execute former decree; when may be filed by defendant to original suit.*—After the rendition of a decree by which the rights of the parties are ascertained, both complainants and defendants being equally entitled to the benefit thereof, a defendant, who has an interest in the execution of the decree, or who has rights involved which require a revivor, will be allowed to revive it by bill filed for that purpose. *Griffin v. Spence, Adm'r*, 393.
66. *Same; parties to original decree must be parties to.*—The parties to the original decree must, as a general rule, be parties to the bill to revive and enforce it; and their presence can not be dispensed with, unless it appears that they can not execute the decree nor be the objects of its operation. *Id.* 393.
67. *Same; rule as to parties.*—The general rule prevailing in a court of equity, that all persons having a material interest to be effected by the decree, must be made parties, applies to bills to revive and enforce a former decree, not only that a multiplicity of suits may be avoided, and complete justice done, but that there may be security in the performance of the decree, and the litigation closed, incapable of being reopened by parties having interests in it, but who are not before the court. *Id.* 393.
68. *Same.*—W. and K. having been partners, died leaving their partnership affairs unsettled, and letters of administration were granted on their estates. By agreement between their administrators, T., the administrator of W., who died first, was to "control and wind up" the partnership business; and in pursuance of that agreement he filed a bill in equity, and obtained a moneyed decree against C. on a demand due from the latter to the partnership. To the bill S. as the administrator of K. was made a party defendant, but against him no relief was sought or obtained. Afterwards T. died, having only collected half of the amount of the decree. *Held*,  
 (a) That the successor to T. in the administration of the estate of W. is a necessary party to a bill filed by S. as the administrator of

CHANCERY—*Continued.*

K. to revive and execute the decree; and that his presence as a party can not be dispensed with upon the averment that none had been appointed, and that in equity and right such successor would have no claim to the unpaid balance due on the decree, but, that, he having collected half of the decree, such balance was the property of S. as the administrator of K., the complainant.

(a) That these are matters such successor has the right, and must have the opportunity of litigating, and they can not be finally determined in his absence. *Ib.* 393.

See AMENDMENT, 1—6.

II. CROSS BILL; ANSWER; DEMURRER; MOTION TO DISMISS.

69. *Notes for purchase-money of land; when set-off allowed against.* Where, contemporaneously with the execution of several notes for the unpaid purchase-money of land, an agreement in writing was entered into between the vendor and vendee, whereby the vendor agreed to furnish to the vendee a "complete chain of title to the land purchased," showing the vendor's clear right to convey the land, and for the performance of this promise it was stipulated that the notes should be "bound,"—held, on cross bill in suit brought to enforce the vendor's lien.

(a) That the damages resulting from the non-performance of the promise, whether regarded as liquidated or unliquidated, may be set-off, recouped, or deducted from the notes, the parties having so stipulated in their contract.

(b) That the notes having been made payable to a third party, at the vendor's request, without any consideration therefor moving from him, he takes them as a mere volunteer, and the agreement is binding on him. *Hooper v. Armstrong*, 343.

70. *Special damages must be specially pleaded in equity as well as at law.* The rule in actions at law for the recovery of special, as contradistinguished from general, damages, that such damages must be specially and circumstantially stated, so as to apprise the party from whom they are claimed of the facts relied on for a recovery, and so that the court may ascertain whether, upon the facts, there is a right to compensation,—is necessarily applicable to a cross bill in equity claiming such damages as a set-off against the demand sought to be enforced by the original bill. *Ib.* 343.

71. *Cross-bill claiming special damages as a set-off; when defective.*—An averment in a cross-bill claiming, as a set-off against the demand sought to be enforced in the original bill, special damages resulting from the breach of contract between the complainant and defendant, where the general damages appear to be merely nominal, that the complainant had thereby "damaged the defendant up to this time more than two thousand dollars," and that his damage is continuous,—is the mere conclusion of the pleader, is insufficient and can not uphold the claim for special damages resulting from the breach. *Ib.* 343.

72. *Bill in equity to enforce vendor's lien; a proceeding in personam; what set-off allowable.*—A bill in equity to enforce the equitable lien of a vendor of lands, for the payment of the purchase-money, is not a proceeding in rem, but strictly a proceeding in personam for the enforcement of a debt or demand to which the lien is an incident; and in reduction or extinguishment of such debt or demand, the purchaser whose personal liability is sought to be enforced, may set off any debt or demand which would be the proper subject of set-off, if he were sued therefor in an action at law. *Ib.* 343.

73. *Same; when bill filed by assignee.*—If the bill in such case is filed by



CHANCERY—*Continued.*

- an assignee, or by any other person than the real owner of the debt, he may have the benefit of sets-off acquired and held against the assignor before notice of the assignment, or the benefit of the defense, in the other case, he could have had against the real owner. *Ib.* 343.
74. *Set-off; benefit of, can be had against beneficial owner, though not a party.*—The benefit of a set-off can be had against the beneficial owner of the debt, although he is not a party to the record. *Ib.* 343.
75. *Bill to enjoin sale under mortgage; when cross bill not necessary to support decree of sale for payment of mortgage debt.*—Under a bill filed by a mortgagor seeking to enjoin a sale of property conveyed by mortgage under a power contained therein, on the grounds of usury and payment, and offering to pay whatever sum might be adjudged to be due on the mortgage debt, and submitting himself to the jurisdiction of the court, a court of equity, deriving jurisdiction from such offer and submission, has adequate power, without a cross bill, to decree a sale of the mortgaged premises for a payment of the mortgage debt, unless the same is paid by the mortgagor within the time specified in the decree. *Mooney v. Walter*, 75.
76. *Defenses to bill to foreclose mortgage.*—On a bill filed to foreclose a mortgage by the assignee of the debt secured thereby, no other defenses involving the validity of the debt are open, than could be made in an action at law on the debt. *Hawley v. Bibb*, 52.
77. *Demurrer to bill in equity; must be based upon matter apparent on face of bill.*—A demurrer to bill in equity must be based upon matters apparent on the face of the bill, and can not be supported by any new fact or foreign matter alleged by the defendant. Therefore, if a written instrument is not correctly set out in the bill, the variance between it and the original is not available on demurrer. *Bromberg Bros. v. Heyer Bros.* 22.
78. *Disclaimer by defendant to bill; when not allowable.*—A proper or necessary party to a bill in equity can not, by a disclaimer, avoid his liability under the bill; and a motion to be discharged made by such defendant and based on such disclaimer, should be overruled. *Ib.* 22.
79. *Motion to dismiss bill for want of equity; when should be overruled.* Under the rules of practice governing courts of chancery in this State, a motion to dismiss a bill for want of equity should only prevail when, admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relief. If it is apparent, upon a proper statement of the facts, and appropriate prayer, equitable relief may be obtained, the motion should be overruled, and the respondent put to his demurrer, or leave should be granted to the complainant to amend, so as to obviate the defects in the bill. *Hooper v. Savannah & Memphis R. R. Co.*, 529.

## HEARING AND DECREE.

80. *Hearing before cause at issue; when not an error available on appeal.* While it is erroneous to proceed in a court of equity to the taking of testimony, and to a hearing before the cause is at issue as to one of the defendants; yet, if this error is committed through the complainant's fault, it will not be available to him in this court on an appeal taken by him. *Vaughan v. Smith*, 92.
81. *Allegata and probata must correspond.*—The rule prevails in both courts of law and equity, that the *allegata* and *probata* must substantially correspond. However cogent may be the proof, however just may be the complainant's demand, no relief can be granted without the requisite allegations being made in the bill. *Winter v. Merrick & Sons*, 86.

## CHANCERY—Continued.

82. *Allegata and probata; when a fatal variance between.*—Where the complainant, a married woman, in a bill seeking an equitable attachment, alleges that the *whole* of the money sought to be recovered is *her* property, constituting a portion of her statutory separate estate, and the proof shows that she had only a *life interest* in the money, with *remainder* to her children, the variance between the allegations and proof is fatal. *Ib.* 86.
83. *Allegations and proof; when there is a variance.*—There is a fatal variance between the allegations and proof, when, in the bill, filed by a surviving widow, whose husband died while the exemption act of April 23d, 1873, was of force, leaving no minor children, in which she seeks the specific performance of a contract of purchase made by the husband of a house and lot, which he occupied at the time of his death as a homestead, and which was exempt to him, as such, under the act, the complainant claims the entire ownership of the title of which the husband died seized, while the proof shows, that the husband's estate had not been judicially ascertained to be insolvent, and, therefore, her ownership was only a right to *retain* the homestead, as against ordinary creditors and the heirs, until the fact of insolvency has been so ascertained. *Munchus v. Harris*, 506.
84. *Decree dismissing bill absolutely for variance between the allegations and proof; when this court will reverse, and enter decree dismissing bill without prejudice.*—A decree of the chancery court dismissing a bill on account of a fatal variance between the allegations and proof, which may possibly be remedied by amendment, will, on appeal, be reversed by this court, and a decree here entered dismissing the bill without prejudice. *Ib.* 506.
85. *Presumption in favor of chancellor's conclusion on facts; when indulged in.*—Where there is a conflict in the testimony, the conclusion of the chancellor thereon will not be disturbed, unless this court is clearly convinced that such conclusion is erroneous. *Folmar v. Folmar*, 84.
86. *Decree pro confesso; when taken too soon.*—A defendant having thirty entire days within which to answer or plead to a bill in equity after service of the summons, a decree *pro confesso* rendered on the thirtieth day, is taken one day too soon and is erroneous. *Madden v. Floyd*, 221.
87. *Decree pro confesso no bar to motion to dismiss bill for want of equity.* Under the statute and rules of practice (Code of 1876, § 3826; Rule Ch. Pr. 76), a decree *pro confesso* against a defendant will not preclude him from moving to dismiss the bill for want of equity. *Ib.* 221.
88. *Decrees against non-resident defendants; when not absolute.*—A decree in equity against a non-resident defendant, without personal service, who does not appear, is not absolute under the statute (Code of 1876, § 3830), until eighteen months from the rendition thereof; and within that period the chancellor has the power, and it is his duty, on the filing of a petition by such defendant showing sufficient cause therefor, to open the decree and hear the cause upon the merits. *Lehman, Durr & Co. v. Collins*, 127.
89. *Same; when notice of the petition essential.*—Where a non-resident defendant files his petition to open a decree rendered against him after such decree has been executed, and all proceedings in the cause have been terminated, and the parties have been dismissed the court, notice of the petition must be given to the parties having rights and interests, which would be affected by setting aside the decree and re-opening the litigation, although the statute is silent as to such notice. *Ib.* 127.
90. *Same; not set aside as matter of absolute right and of course.*—Under

CHANCERY—*Continued.*

the present statute, a decree against a non-resident defendant, without personal service, should not be opened as a matter of absolute right and of course, on the presentation of a petition, but only upon sufficient cause shown. It should be shown that because the party had not actual notice of the suit and the opportunity to defend, an unjust decree had been pronounced against him; and if this is not shown, but it is apparent from the averments of the petition, that the decree is right and just in itself, and such an one as the court, on another hearing, would be bound to render, the decree should not be opened or set aside. *Ib.* 127.

See AMENDMENT, 4-6.

## IV. REFERENCE TO, AND PROCEEDINGS BEFORE REGISTER.

91. *Exceptions to master's report.*—Where a party excepting to the register's report fails to comply with the 93d Rule of Chancery Practice, requiring the noting of evidence at the foot of each exception to conclusions of fact drawn by the register, the chancellor commits no error in overruling the exception entirely. *Crump v. Crump*, 156; *Mooney v. Walter*, 75.
92. *Same; failure to note evidence relied on; its effect.*—Where a party has failed to note at the foot of an exception taken by him to a conclusion of fact reported by a register, the evidence or parts of evidence on which he relies to support his exception, under the 93d Rule of Chancery Practice, the exception should be overruled. *Vaughan v. Smith*, 92.
93. *Exception to register's report; its office.*—The appropriate function of an exception to a register's report, is to point out distinctly and clearly the error, or matter complained of as error. A mere general objection to the rulings or conclusions of the register, or to the results attained by him in the statement of an account, can not be entertained. *Ib.* 92.
94. *Register's report; when he need not report evidence taken before him.* Under a decree of reference directing an account, and that the register report his conclusions upon the matters of fact referred to him for ascertainment, such conclusions form the only proper subject-matter of his report; and it is not his duty to report the oral evidence taken before him on the reference and reduced to writing, or the facts shown thereby, from which his conclusions were drawn. *Ib.* 92.
95. *Same; when should not be disturbed.*—Where the conclusions of the register are drawn not only from depositions, but also from the oral examination of witnesses before him, the same weight and effect ought to be accorded to his findings as would be given to the verdict of a jury. If from the whole evidence it be a matter of reasonable doubt whether his findings are correct, they should not be disturbed. *Ib.* 92.
96. *Finding of register on oral testimony; its weight on appeal.*—The finding of a register, based on the testimony of witnesses, who were present and testified orally before him, comes before a revising court with strong presumption of its verity; and this court will not reverse it, unless the preponderance of evidence against its correctness is so strong, that a judge at *nisi prius* would feel authorized to set aside a verdict rendered on similar testimony. *Lehman v. Levy*, 48.
97. *Register's report; correction of error on appeal.*—Where the register, in stating an account, commits an error in computation of interest, and an exception is taken by the injured party to the report, covering only a part of such error, this court is not authorized to go beyond the scope of the exception; but the error, so far as covered



CHANCERY—*Continued.*

by the exception, will be here corrected, without remanding the cause. *Ib.* 48.

## CHANGE OF VENUE.

1. *Change of venue; prepayment of costs by party applying for.*—It is the duty of a party obtaining a change of venue, under the statute (Code of 1876, § 3119), to prepay the fees prescribed by the statute for a messenger to transport the transcript and papers in the cause to the court to which the same is removed without any demand therefor; and the clerk is not required to transmit the transcript and papers without the prepayment of such fees. *Ex parte Holton*, 164.
2. *Same; effect of.*—The effect of a change of venue regularly granted, is the discontinuance of the suit in the court in which it was brought; and thereupon the cause passes out of the jurisdiction, and off the docket of that court; and unless it is transferred to the court to which the change was made and docketed there, to have a place in any court. *Ib.* 164.
3. *Discontinuance; what amounts to.*—A plaintiff in an action of forcible entry and detainer pending in the circuit court, obtained a change of venue, but neglected for about seven years to prepay the messenger's fees to transport the papers in the cause to the court to which the change was made, or to tender the same, and by reason of such neglect, the papers did not reach the latter court until about seven years after the order for the change of venue was entered, and during that time the cause remained off the docket; held, that this wrought a discontinuance of the cause; and this court, on defendants' petition, awarded a *mandamus* compelling the circuit judge to strike the cause from the docket, he having refused to do so on motion made by defendants. *Ib.* 164.

## CHARGE TO JURY.

1. *On effect of testimony; when shown not to be error.*—Where the bill of exceptions does not purport to state all the evidence which was introduced on the trial, this court can not affirm that the lower court erred in refusing a general charge upon the effect of the testimony, requested by one of the parties. *Tuttle v. Walker*, 172; *Pace & Cox v. The State*, 231.
2. *Charge upon effect of the testimony; when properly refused.*—A general charge upon the effect of the testimony can be given with propriety, only when the evidence as to all material facts, is free from conflict. *Tuttle v. Walker*, 172.
3. *Charges of the court ex mero motu; how case should be presented to the jury by.*—The general charge of the court, given *ex mero motu*, should present the case on trial in all the phases and aspects in which the jury ought to consider it, not giving any undue prominence to, or leaving in obscurity any phase or aspect, which the testimony tends to support; and if such charge in effect discards, or ignores, and thereby induces the jury to discard any real, material element of the offense imputed to the accused, it ought not to be supported. *Woodbury v. The State*, 242.
4. *When erroneous.*—As a general rule, if affirmative charges assert correct legal propositions, their generality, obscurity, or ambiguity must be obviated by a request for more specific instructions; but if the immediate, direct tendency of such instructions is to mislead the jury, diverting their attention from material evidence, and from the consideration of controlling inquiries, or creating the impression that they are authorized to exclude evidence they ought to consider, such instructions are erroneous, and will operate a re-

CHARGE TO JURY—*Continued.*

- versal of the judgment they have induced. *Woodbury v. The State*, 242; *Jackson & Dean v. The State*, 249.
5. *Same.*—The giving of a charge in a criminal case at the request of the State, which pretermits all inquiry as to venue, is a reversible error. *Collier v. The State*, 247.
  6. *Where the evidence is conflicting.*—Where the evidence in a cause is conflicting, and the case is presented to the jury in two variant phases, each party is justified in having the jury instructed as to the law, as it would arise if his hypothesis were the true one. The charge, however, must properly refer to the jury the finding of the facts, and the application of the law must be made contingent on the ascertainment of the facts embraced in the the hypothesis. *Hill v. Townsend & Eubanks*, 286.
  7. *When error without injury.*—A charge which refers to the jury the construction of a written contract, is without injury to the appellant, when the court should have construed such contract against the views maintained by him. *Ib.* 286.

See BILL OF EXCEPTIONS, 7, 8, 9.

## CODE OF ALABAMA.

1. § 401. Compensation to tax assessor. *East v. Eichelberger*, 187.
2. § 414. Settlement of tax collector. *The State v. Lott*, 147.
3. § 464. Limitation of suit for recovery of land sold for taxes. *Pugh v. Youngblood*, 296.
4. § 559. Substitution of lost records in probate court. *McBryde v. Rhodes*, 133.
5. § 657, subd. 3. Supervisory powers of circuit court. *State ex rel. Pinney v. Williams*, 311.
6. § 845. Duties of county treasurer. *State ex rel. Mobile Co. v. Stone, Treas.*, 206.
7. §§ 1701, 1711. Damages to stock by railroad. *Ala. Great Southern R. R. Co. v. Killian*, 277.
8. §§ 1937-43. Building and loan associations. *Security Loan Association v. Lake*, 456.
9. § 2121. Statute of frauds. *Madden v. Floyd*, 221; *Moog v. Strang*, 98; *Heflin v. Milton*, 354.
10. § 2126. General assignment. *Danner & Co. v. Brewer & Co.*, 191; *Bromberg Bros. v. Heyer Bros.*, 22.
11. § 2131. Contracts founded on gambling considerations. *Hawley v. Bibb*, 52.
12. §§ 2145-46. Execution of deeds. *Stewart v. Beard*, 470.
13. § 2154. When deed self-proving. *Dugger v. Collins & McRae*, 324.
14. § 2166. When mortgage of land void for failure to record. *Lehman, Durr & Co. v. Shook*, 486.
15. § 2185. Naked trusts. *Wilkinson v. May*, 33.
16. § 2216. Disposition under appointment. *Collins, Guardian, v. Toomer*, 14.
17. §§ 2292-3. Dissent by widow from will of deceased husband. *Crenshaw v. Carpenter*, 572.
18. §§ 2524-5-8. Settlement by administrator. *Cook v. Cook, Ex'r*, 294.
19. §§ 2590-1. Settlement by administrator on his resignation or removal. *Ib.* 294.
20. §§ 2597-8. Non-claim. *Taylor, Adm'r, v. Robinson, Adm'r*, 269.
21. § 2687. Divorce for cruelty. *Folmar v. Folmar*, 84.
22. § 2714. Husband's distributive share of wife's estate. *Chambers v. Ringstaff*, 140.
23. § 2748. Appointment of guardian. *Describes v. Wilmer*, 25.
24. § 2820. Exemption. *Weis v. Levy*, 209; *Williams v. Bowden*, 433.

CODE—Continued.

25. §§ 2836-8. Contest of exemption. *Levy & Co. v. Moog*, 63.
26. § 2886. Redemption of real estate by child under conveyance from parent. *Lehman, Durr & Co. v. Shook*, 486.
27. § 2904. Suits against partnerships. *Yarbrough v. Bush*, 170; *Hall v. Cook*, 87; *Hall v. Green & Co.*, 368.
28. § 2908. Revivor of action. *Ex parte Sayre*, 184.
29. §§ 2962-3. Plea of not guilty and disclaimer in action of ejectment. *Alexander v. Wheeler*, 332.
30. § 2966. Possession under color of title. *Allen v. Kellam*, 442.
31. § 2967. Verdict in ejectment. *Alexander v. Wheeler*, 332.
32. § 3006. Right of amendment. *Kingsbury v. Milner*, 502.
33. § 3009. Form No. 12—on bonds with condition. *Dothard v. Sheid*, 135.
34. §§ 3107-8. Bill of exceptions. *Weems v. Weems*, 104.
35. § 3111. Establishing bill of exceptions in Supreme Court. *Posey v. Beale*, 32.
36. § 3119. Messenger's fees on change of venue. *Ex parte Holton*, 164.
37. § 3226, subd. 7. Statute of limitations—actions against sureties on guardians' bonds. *Garrett v. Garrett*, 429.
38. § 3235. Statute of limitations; exception on reversal of judgment. *Morrison v. Stevenson*, 448.
39. § 3269. Answer of garnishee. *Security Loan Ass'n v. Weems*, 584.
40. § 3286. Lien for advances to make crops. *Collier & Son v. Faulk & Martin*, 58; *Comer v. Daniel*, 434.
41. § 3302. Suggestion by garnishee of adverse claim. *Security Loan Ass'n v. Weems*, 584.
42. §§ 3467-73. Landlord's lien for rent and advances. *Tuttle v. Walker*, 172; *Fitzsimmons v. Howard*, 590; *Busbin v. Ware*, 279.
43. §§ 3474-5. Relation of landlord and tenant. *Collier & Son v. Faulk & Martin*, 58; *Holcombe v. The State*, 218; *McCall v. The State*, 227.
44. § 3601. Practice in mandamus cases. *Leigh v. The State ex rel. O'Bannon*, 261.
45. § 3606. Venue in suits before justices of the peace. *Atkinson v. Wiggins*, 190.
46. §§ 3663-75. Summary judgments. *Thompson v. Acree*, 178.
47. § 3697-3710. Unlawful detainer. *Beck v. Glenn*, 121.
48. § 3758. Limitation of suits in chancery. *Morrison v. Stevenson*, 448.
49. § 3790. Amendments in chancery. *Rapier v. Gulf City Paper Co.*, 476; *Winter v. Merrick*, 86; *Kingsbury v. Milner*, 502.
50. § 3824. Decrees *pro confesso*. *Madden v. Floyd*, 221.
51. § 3830-1. Decrees against non-residents without personal services. *Lehman, Durr & Co. v. Collins*, 127.
52. § 3917. Appeal from interlocutory orders. *Crumley Bros. v. Bryan & Co.*, 91.
53. § 4109. Carrying concealed weapon. *Harman v. The State*, 248.
54. § 4189. Adultery between white person and negro. *Pace & Cox v. The State*, 231.
55. § 4203. Using abusive, vulgar or insulting language, etc. *Bragg v. The State*, 204.
56. § 4311. Robbery. *Jackson & Dean v. The State*, 249.
57. § 4353. Removing, or selling property covered by lien. *Ellerson v. The State*, 1.
58. § 4354. Selling or conveying mortgaged property. *Johnson v. The State*, 593.
59. § 4376. Obtaining property under false pretenses. *Woodbury v. The State*, 242.
60. § 4731. Hard labor for costs. *Bradley v. The State*, 318.



## CODE—Continued.

61. § 4806. Indictment for retailing. *Powell v. The State*, 10 ; *Boon v. The State*, 226.
62. §§ 4872-4. Trial of capital offense. *Spicer v. The State*, 159.
63. § 5043. Sheriff's fees for feeding prisoners. *Bradley v. The State*, 318.

## COLOR OF TITLE.

1. *Deed to purchaser of lands at tax sale is color of title, though invalid.* Although a conveyance to the purchaser of lands sold for non-payment of taxes may not recite facts which would support the sale, and for that reason is invalid upon its face, such conveyance constitutes color of title, and possession taken and held under it is adverse, and will not only bar the entry of the true owner, but will ripen into an indefeasible title, if it be continued for the period prescribed by the statute of limitations. *Pugh v. Youngblood*, 296.
2. *Color of title and good faith under section 2966 of the Code.*—A deed made by one acting as administrator under a void appointment, though void itself, is color of title within the meaning of section 2966 of the Code of 1876, providing that persons holding under color of title, in good faith, are not responsible for damages or rent, in actions for realty, for more than one year before the commencement of the suit, when, on its face, it appears to convey a good title, and its defects are made manifest only by proof of extrinsic facts. *Allen v. Kellam*, 442.

## COMMON CARRIER. See RAILROAD.

## COMMON LAW.

1. *Presumed to prevail in New York.*—In absence of proof to the contrary, the common law is presumed to prevail in the State of New York. *Hawley v. Bibb*, 52.
2. *Presumed to prevail in Pennsylvania.*—And also in the State of Pennsylvania. *Snow v. Schomacker Man. Co.*, 111.
3. *Presumed to prevail in Mississippi.*—And also in the State of Mississippi. *Danner & Co. v. Brewer & Co.*, 191.

## CONSTITUTIONAL LAW.

1. *Constitutional provisions ; rule of construction.*—In the construction of constitutional provisions prescribing rules of legislative procedure, the observance of which is essential to the validity of legislative enactments, the courts keep steadily in view the purposes of their adoption, and avoid a closeness of construction which would tend to embarrass legislation. *Montgomery M. B. and L. Association. v. Robinson*, 413.
2. *Second clause of second section of fourth article of constitution of 1865, construed.*—The second clause of the second section of the fourth article of the constitution of 1865, providing that "each law shall embrace but one subject, which shall be described in the title," was not directed against the generality and comprehensiveness of titles to legislative enactments ; but against combining several projects or subjects, having no proper relation to each other, in one bill, of which the title gave no intimation. *Ib.* 413.
3. *Same ; the act incorporating The Montgomery Mutual Building & Loan Association, not violative of constitution.*—The act of the General Assembly entitled "An act to incorporate The Montgomery Mutual Building and Loan Association," approved February 11th, 1867 (Pamph. Acts, 1866-7, p. 408), had but one subject, which the title with clearness indicates, though it may not indicate the

CONSTITUTIONAL LAW—*Continued.*

objects the corporation is designed to accomplish, or the powers with which it is to be invested, or the agency to be employed, or the mode to be pursued in exercising the powers. These are incidents necessarily pertaining to corporate existence—parts of the general subject expressed in the title. This act did not, therefore, offend such constitutional provision. *Ib.* 413.

4. *Section 2 of article 4 of constitution of 1875, construed.*—The constitutional provision requiring that each law shall contain but one subject, which shall be clearly expressed in its title (Con. 1875, § 2, Art. 4), is intended to prohibit the legislature from introducing into the body of an act such foreign or incongruous matters as are not reasonably comprehended within the title; but not from embodying in an act various details relating to one general subject, which is so expressed in the title as not to mislead or deceive. *Carson v. The State*, 235.
5. *Same; when act not violative thereof.*—The act entitled “An act to prohibit the sale or otherwise disposing of spirituous, vinous or malt liquors within one mile of the court house in the town of Ashville, in St. Clair county,” approved February 1st, 1871, (Pamph. Acts, 1870–1, p. 189), which, in the body thereof, prohibits the selling, giving or delivering of “spirituous, vinous or malt liquors, ale, lager beer, or intoxicating bitters, in quantities less than forty gallons” within the territory designated in the title, and which contains two provisos excepting certain cases from its operation, is not violative of the constitutional provision requiring that each law shall contain but one subject, which shall be clearly expressed in its title. *Ib.* 235.
6. *Act of legislature authorizing sale of decedent's land by widow, constitutional.*—An act of the General Assembly authorizing the widow to sell lands of a decedent at private sale, subject to the approval of the judge of probate of the county in which the decedent resided at the time of his death, is constitutional; and a sale and conveyance made by the widow, and approved by the judge of probate under the act, passed the legal title to the purchaser. *Bruce v. Bradshaw*, 360.
7. *Section 4189 of the Code of 1876, not violative of constitution of United States.*—The fact that the punishment affixed to the offense of living in adultery or fornication, when committed by a negro and white person together, is different from that affixed to that offense when committed by two white persons or two negroes, is not a discrimination in favor of, or against either race; and the statute prescribing such punishment (Code of 1876, § 4189), is not violative of the 14th amendment of the constitution of the United States. *Pace & Cox v. The State*, 231.
8. *When part of statute violative of constitution may be expunged without affecting other parts.*—If the provisions of an act of the legislature are all connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning, that it can not be presumed that the legislature would have passed the one without the other, the constitutional invalidity of one part of the act will vitiate the other, and both must fall together. But if the parts of an act are perfectly distinct and separable, and are not dependent the one on the other, and effect can thereby be given to the act, the unconstitutional part of the act may be expunged, and the other parts be permitted to stand; and this too, even if the valid and invalid parts are in the same section. *Powell v. The State*, 10.
9. *Same; local statute prohibiting sale of liquors construed.*—Where an act of the legislature, prohibiting the sale or other disposition of any vinous, spirituous or malt liquors, under a penalty, contains a

CONSTITUTIONAL LAW—*Continued.*

- proviso exempting from the prohibition of the act the sale of domestic wines manufactured from grapes grown in this State, a discrimination is thereby made against wines made from grapes grown in other States, but not against foreign spirituous or malt liquors. And while it *may be*, that this legislative discrimination is invalid so far as concerns wines imported from other States, under the principle decided in *Welton v. Missouri*, 91 U. S. 275, and followed by this court in *Vines v. The State*, 67 Ala. 73—a point not decided—the rest of the law would be unaffected thereby, and would stand *Ib.* 10.
10. *Slaves emancipated by ordinance of 22d September, 1865.*—The institution of slavery ceased to have a legal existence in this State from and after the adoption, by the Constitutional Convention of 1865, of the ordinance of 22d September of that year, which declared that thereafter there should not be in this State "slavery nor involuntary servitude, otherwise than as punishment for crime."—(Rev. Code, p. 53.) *Washington v. Washington*, 281.
  11. *Ordinance of 29th September, 1865, ratifying and legalizing marriages between freedmen and freedwomen.*—The ordinance of the 29th September, 1865, (Rev. Code, p. 64), adopted by the convention in recognition of the necessity for a definition of the legal status of the population emancipated from slavery, living together as man and wife, commends itself to the moral sense, is eminently just, conservative of social order, promotive of morality, and preservative of the legitimacy and rights of the innocent offspring of the pre-existing union it ratified and legalized, and belongs to a class of legislation, which, when employed for such beneficent purposes, deserves the highest judicial consideration. *Ib.* 281.
  12. *Same; its effect and operation.*—By force of the ordinance, all the legal infirmity of the relation between the parties to whom it applied, was removed, and they became man and wife. By the ordinance they were not compelled into an involuntary relation; but the voluntary relation which they had formed, and which, by continuance after emancipation, they had affirmed, so far as it was capable of confirmation by their own acts, was legalized. *Ib.* 281.
  13. *Same.*—The ordinance had no reference to, or effect upon mere illicit intercourse, not intended, or recognized by the parties as marriage. It is not the cohabiting *like* man and wife, but the cohabiting *as* man and wife, and in mutual recognition of the relation, the ordinance legalizes. *Ib.* 281.
  14. *Same; widow of freedman whose marriage was thereby legalized, entitled to dower.*—Under the operation of this ordinance, the marriage of two negroes, who intermarried in 1847, while they were both slaves, and who continued to live together as man and wife until their emancipation, and thereafter for several months after the adoption of the ordinance, was legalized, and on the death of the man, the woman, as his widow, was entitled to dower in his lands, although the man, in October, 1866, abandoned her, procured a marriage license and married another woman, with whom he lived as his wife until his death. *Ib.* 281.
  15. *License to sell liquors not a contract.*—A license issued under the general statute to a dealer in liquors, is in no sense, a contract between the State and the licensee, and it is not protected by the contract clauses of the Federal constitution and of the constitution of this State. It is a mere *permit* and can be revoked by the legislature at pleasure. *Powell v. The State*, 10.

## CONTESTED ELECTIONS.

1. *Provisions for contest in general election law; when inapplicable.*—The



CONTESTED ELECTIONS—*Continued.*

- act of the General Assembly, approved February 18th, 1881 (Pamph. Acts, 1880-81, p. 220), authorizing an election for the purpose of permanently locating the county site of Escambia county, makes no provision for a contest of the election to be held thereunder; and as the provisions of the general election law regulating contests of election (Code, 1876, §§ 302-41) being confined to election of persons to office, are not applicable, there is no provision made by the statutes for a contest of such an election. *Leigh v. The State ex rel. O'Bannon*, 261.
2. *Same*; to contest the declared result of an election, not within the scope of its operation.—The result of an election held under an act of the General Assembly, authorizing an election for the purpose of permanently locating the county site of Escambia county, as declared by the board of supervisors, can not be contested by *mandamus*, although no other remedy is provided by law for such a contest. *Ib.* 261.
  3. *Quo warranto*; when not a remedy to contest an election.—The result of such an election, so declared, can not be contested by *quo warranto*, or by the statutory proceedings in the nature of a *quo warranto*. 261.
  4. *Election under local option law*; contest thereof.—The local option law of Calhoun and other counties, approved March 19th, 1875, (Pamph. Acts, 1874-5, p. 276), containing no provision for contesting elections held thereunder, if there be irregularities in such elections, not apparent on the face of the proceedings or return, statutory contest is not the mode of inquiring into, or correcting them. *Savage v. Wolfe*, 569.

## CONTEST OF EXEMPTIONS.

See EXEMPTIONS.

## CONTRACTS.

1. *Future contracts*; when invalid.—While the sale of goods, to be delivered at a future day, is valid, although the vendor neither has the goods in his possession, nor has contracted for the purchase of them, nor has any expectation of acquiring them except by purchase at some time before the day of delivery; yet, if from the nature of the transaction and the circumstances attending it, whatever may be the form of the contract, it is apparent that the parties did not intend either a purchase or sale, or a delivery of the goods, but that, at the time appointed for delivery, the transaction should be closed upon the basis of the then market price, the losing party paying to the other the difference,—such a transaction is a wager, and is void at common law. *Hawley v. Bibb*, 52.
2. *Same*; when advances made therefor by broker recoverable.—In the absence of a statute pronouncing future contracts, which are mere wagers, illegal and void, the general rule is that where a party makes such contracts through a broker, for a commission only, which is payable in any event, whether loss or gain result to the principal, such broker having no interest in the contracts, the principal is bound to reimburse the broker for advances made for him, if he subsequently execute his note or bill therefor, or make an express promise to pay them, or if, with full knowledge of the facts and without objection, he permits the transaction to proceed. *Ib.* 52.
3. *Contracts founded on a loan or advance of money to bet or stake as a wager*; their validity.—If a party employ a broker to make for him contracts for the future delivery of cotton, and gives to such broker his acceptance of a bill of exchange to be discounted and used in

CONTRACTS—*Continued.*

making such contracts; and if at the time it was his purpose, as was known to the broker, neither to actually buy or sell cotton, nor to receive or to deliver it, but simply to stake margins to cover differences in price, and, on final settlement, merely to receive or pay the difference between the contract price and the market price at the time fixed by the contract for delivery,—the consideration of the bill of exchange would represent a loan or advance of money to bet or stake as a wager on the future price of cotton; and if the contract further contemplates that the money is to be advanced and loaned in this State, upon transactions to be made here, the bill of exchange would fall within the interdiction of the statute, and would be void in the hands of an innocent holder for value. *Ib.* 52.

4. *Contracts founded on a gambling consideration void under the statute.* The statute of this State (Code, § 2131,) pronounces all contracts founded, in whole or in part, on a gambling consideration, void; and, under its operation, negotiable instruments made upon a gambling consideration, or for a wager, are void, even in the hands of an innocent holder for value. *Ib.* 52.
5. *Validity of contract determined by the law of place of performance.* The force and validity of a contract, made in this State, but in the performance of which all acts and transactions were contemplated and were in fact done and performed in another State, must be determined by the law of that State. *Ib.* 52.
6. *Construction of contract determined by place of performance.*—The construction of a contract of sale of personal property, made and performed in another State, must be determined, as to its obligations and the rights of the parties thereunder, by the law of such State. *Snow v. Schomacker Manuf. Co.*, 111.
7. *Contract of sale; when advertisement a part of.*—Where a manufacturer offers by letter to sell pianos of his own manufacture to a party at a distance, stating the terms of the sale, and directing attention to a circular advertising the pianos, sent by the same mail, on the front page of which is printed in a conspicuous manner the words, "Every piano warranted for five years;" these words are thereby incorporated into the offer contained in the letter, and, on acceptance of the offer, and a purchase thereunder, after the receipt of the circular, they constitute a part of the contract of purchase. *Ib.* 111.
8. *When void as against public policy.*—All agreements, express or implied, the consideration of which is the compounding of a felony, or the suppression of a prosecution for a criminal offense, strictly public in its character, are illegal and void as against public policy. *Moog v. Strang*, 98.
9. *When not affected by motives of parties.*—When a crime has been committed, creating a civil liability against the offender, and a settlement of such civil liability is made between the parties in interest, the motives prompting them to make the settlement, however reprehensible they may be, are not cognizable by the courts, so long as the minds of the parties fall short of concurring in an *agreement*, express or implied, to compound, or not to prosecute the crime, as the consideration, in part or in whole, of the payment of the debt or damages resulting from the commission of the offense. *Ib.* 98.
10. *When contract constitutes contracting parties tenants in common.*—Independent of, and apart from the influence of § 3475 of the Code, a contract between two parties farming together, by the terms of which one is to furnish the land and stock and feed for stock, and the other all the labor to make a crop, the crop when made to be equally divided between them, constitute the parties thereto tenants in common of the crop raised by them under the contract. *Col-*

## CONTRACTS—Continued.

*lier & Son v. Faulk & Martin*, 58 ; *McCall v. The State*, 227 ; *Holcombe v. The State*, 218.

11. *Sections 3474 and 3475 of the Code construed.*—The act of February 9, 1877, (Acts 1876-7, p. 74), which is now partially embraced in sections 3474 and 3475 of the Code, did not totally abrogate or abolish the relation of tenants in common in the cases coming within the purview of the act, but only modified it so as to give each tenant in common a lien on the share of the other in the crops jointly raised, with the remedy of enforcing it by attachment. (*BRICKELL, C. J., dissenting.*) *Ib.* 58, 218, 227.
12. *Partnerships ; contracts joint and several.*—Under the statutes of this State, the promises, contracts and obligations of partnerships, whether written or verbal, given within the scope of partnership dealings, are the promises, contracts and obligations of the partnership, and of each and every member thereof. *Hall v. Cook*, 87 ; *Hall v. Green & Co.*, 368.
13. *Construction of.*—Where in a contract of sale of personal property consisting of a steam saw and grist mill, with certain appurtenances, it was provided that the purchase-money should be paid in installments, and that upon default in the payment of any one of the installments, the purchaser should forfeit all former payments made by him, and, on the demand of the seller, should "give into his possession the mill, with all the additions thereto, in good running order, with all obtained from him," the words "additions thereto," as used in the contract, do not embrace detached articles of personal property purchased to aid in operating the mill, such as oxen, carts, etc., but only such personal property as was in fact added to the mill. *Hill v. Townsend & Eubanks*, 286.
14. *Parol contract of sale of personal property valid.*—A parol contract of sale of personal property is valid. *Ib.* 286.
15. *Forfeiture in contract of purchase of personal property does not exist, unless specially provided for.*—The law does not favor a forfeiture in a contract of purchase of personal property, by which a party to the contract loses the benefit of all payments he has made thereon, and also all interest in the property, upon his failure to pay any one of a series of installments of the purchase-money ; and to authorize or sustain such a claim of forfeiture, it must be specially provided for by the contract. *Ib.* 286.
16. *Waiver of forfeiture in contract of sale of personal property.*—A forfeiture contained in a contract of sale of personal property, on default in payment of any one of several installments of the purchase-money, is waived, when the seller, after such default, enters into a new contract of sale with the original purchaser and others, and receives from them payment of all the installments then due from the original purchaser. *Ib.* 286.
17. *Same.*—But a waiver of one or more of such forfeitures or defaults, is not a circumstance tending to show a waiver of subsequent defaults, or forfeitures based thereon ; and a charge instructing the jury, that if four such forfeitures occur in succession, and the seller fails to claim and enforce either of them, then they may look to these facts, in connection with all the other evidence, for the purpose of determining whether he had waived the subsequent forfeitures, is erroneous. *Ib.* 286.
18. *When breach of contract by the seller of personal property will prevent a recovery based on a forfeiture.*—Where the plaintiff in an action for the recovery of chattels in specie, consisting of a steam saw and grist mill and appurtenances, claims under a forfeiture contained in a contract of sale made by him, as seller, with the defendants, as purchasers, and based on a default in payment of part of the purchase money, and it is shown that, in violation of a clause in the



CONTRACTS—*Continued.*

- contract, he failed to furnish the purchasers with certain timber privileges, he can not recover. *Ib.* 286.
19. *Written contract; when varied by oral agreement.*—Where, by the terms of a written agreement of compromise of a pending suit against a town, on bonds issued and delivered by it to a railroad corporation as security for stock subscribed by the town, and by the railroad corporation assigned to the plaintiff, a judgment for a specified amount, which was less than the face of the bonds, was to be taken by the plaintiff in full satisfaction of the bonds, and no mention was made in such agreement of the stock for the security of which the bonds were issued,—a contemporaneous oral agreement to the effect, that the town, as a part of the consideration moving the plaintiff to make the compromise, was also to transfer to the plaintiff stock in the railroad corporation amounting to eight thousand dollars, would vary, and add an important term to, the written contract, which the law does not allow. *Bank of Mobile v. Mobile & Ohio R. R. Co.*, 305.
  20. *Contract of sale, when title does not pass thereby.*—When in a contract of sale of personal property, any thing necessary to individualize the thing sold, such as weighing, measuring, counting, or separating it from a bulk, is wanting, and the thing sold is therefore not susceptible of identification, the title thereto does not pass by the contract to the purchaser, and he can not maintain detinue therefor, or trover for the conversion thereof. *Mobile Savings Bank v. Fry*, 348.
  21. *Validity of contract not affected by fact that consideration moves from one, while its promises and obligations are made to another.* The validity of a contract is not affected, because the consideration may not have moved from the party to whom the obligations of the contract are extended, and in whom the right of enforcement resides. It is not uncommon, that the consideration for a contract moves from one person, while its promises and obligations are made to another, and the validity of such contracts, when accepted by the party to whom the promise or obligation is made, can not be questioned. *Wimbish v. Montgomery M. B. & L. Asso'n*, 575.
  22. *When a fixed sum to be paid on breach of contract, a penalty and not liquidated damages.*—Where a railroad company, having constructed its road-bed through a city lot, instead of proceeding under the statute, entered into a written contract with the owner, thereby acquiring a right of way over the lot, in consideration of a given amount in money, and of an agreement on its part, that it would do certain work on specified streets leading to, or around the lot, where they were intersected by the railroad, within a time prescribed by the contract,—a stipulation in such contract, that for any failure on the part of the company, after the time within which it agreed to do the work, it would pay the owner one dollar per day for each day it was in default, will be construed to have been intended by the parties as a penalty, and not as liquidated damages; and on a breach of the stipulation the owner would be entitled to recover the actual loss or injury sustained by him therefrom, which is the diminution of the value of the lot resulting from the obstruction or interruption by the railroad of the streets on which the work was to be done. *Hooper v. Savannah & Memphis R. R. Co.*, 529.

See AMBIGUITY.

CHANCERY, 15, 23.

CONSTITUTIONAL LAW, 15.

FRAUD AND UNDUE INFLUENCE.

CONTRACTS—*Continued.*

See INSURANCE.

VENDOR AND PURCHASER.

WARRANTY.

COSTS.

See CRIMINAL LAW, 11-14.

COURT, COMMISSIONERS.

1. *Its authority over fine and forfeiture fund.*—The commissioners court has no control over fines and forfeitures; but the fund accruing therefrom is in the custody of the treasurer, and is subject to his continued custody until paid out by him pursuant to law. *The State ex rel. Mobile County v. Stone, Treasurer.* 206.

COURT, COUNTY.

See CRIMINAL LAW, 15.

COURT, PROBATE.

1. *Authority to appoint guardian for minors.*—A probate judge has no authority to appoint a guardian for minors, for the purpose of having them sent into a foreign country; and an appointment made upon an application which shows that such is the purpose for which it was sought, is improvident and erroneous, and may be revoked at same term without notice to the party to whom the letters were issued. *Desribes v. Wilmer,* 25.
2. *Decree confirming sale of lands; its effect.*—The order of a court of probate confirming the sale of lands made by an administrator, is a decree of that court rendered on inquiry, all parties in interest having the opportunity of being heard, and of contesting or of supporting the sale; and if rendered in a case in which the court has jurisdiction, in the absence of fraud, such decree is final and conclusive of the adequacy of the price for which the lands sold, and of all other facts necessarily involved in its rendition, unless assailed on error or appeal. *Lowe v. Guice,* 80.
3. *Lost record.*—When evidence insufficient to authorize its substitution. *McBryde v. Rhodes,* 133.
4. *Power to compel personal representative to settle.*—Under the Code the jurisdiction of the probate court to compel a final settlement of the accounts of an executor or administrator, after eighteen months from the grant of letters, does not depend on the petition of a party interested in the estate, invoking the exercise thereof; but the court may then, *ex mero motu*, compel such settlement, if the condition of the estate will admit of it. *Cook v. Cook et al., Ex'rs,* 294.
5. *When inferior tribunals.*—Probate courts in this State are inferior tribunals, as compared with circuit courts, or with city courts having co-extensive jurisdiction, within the meaning of subd. 3 of section 657 of the Code of 1876. *The State ex rel. Pinney v. Williams,* 311.
6. *Jurisdiction to decree the sale of ward's lands on petition of guardian.* The probate court has jurisdiction to order the sale of real estate belonging to minors, on the application of the guardian, only in the following cases: (1) For the support and education of the ward (Code, § 2780); (2) for reinvestment (*Ib.* § 2785); and (3) for distribution among joint owners (*Ib.* § 3514). *Mohon v. Tatum, Guardian,* 466.
7. *Election under "local option" statute.*—Nature of jurisdiction, and when proceedings thereunder void. *Savage v. Wolfe,* 569.

## CRIMINAL LAW.

## I. ABUSIVE, INSULTING OR VULGAR LANGUAGE IN THE PRESENCE OF FEMALES.

1. *What is a dwelling within meaning of section 4203 of the Code.* Where a husband had left the house which had been his dwelling, with no intention of returning, but he had not removed his household effects therefrom, and his wife had remained spending her days in the house, but her nights elsewhere, and was proposing to remove therefrom, it not being shown that the husband had acquired a dwelling elsewhere,—*held*, that the house was the dwelling of the husband within the meaning of section 4203 of the Code of 1876, punishing the use of abusive, insulting or vulgar language in or near a dwelling in the presence of a female or a member of the family. *Bragg v. The State*, 204.

## II. ADULTERY.

2. *Indictment against white person and negro for living in adultery or fornication; when sufficient.*—An indictment charging that "Tony Pace, a negro, or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication," sufficiently charges the offense of living in adultery or fornication, as demanded by section 4189 of the Code of 1876. *Pace & Cox v. The State*, 231.
3. *Section 4189 of the Code of 1876, not violative of Constitution of United States.*—The fact that the punishment affixed to the offense of living in adultery or fornication, when committed by a negro and white person together, is different from that affixed to that offense when committed by two white persons or two negroes, is not a discrimination in favor of, or against either race; and the statute prescribing such punishment (Code of 1876, § 4189), is not violative of the 14th amendment of the Constitution of the United States. *Ib.* 231.

## III. ARREST.

4. *Power of marshal of Oxford to make arrest.*—Under the act of the General Assembly incorporating the town of Oxford (Pamph. Acts, 1859-60, p. 383), which was revived and re-enacted by the act of March 1st, 1876 (Pamph. Acts, 1875-6, p. 315), imposing on the marshal of the town the same duties, and conferring upon him the same powers, as are "now conferred by law upon the constables of this State," the marshal has authority to arrest, without warrant, any person threatening to commit a breach of the peace in his presence. *Hayes v. Mitchell*, 452.
5. *Power of such officer to imprison after arrest.*—After the arrest of such person, he should not be imprisoned, unless circumstances rendered his imprisonment necessary. But if by reason of the unreasonableness of the hour, or the inaccessibility of the mayor, or other magistrate having jurisdiction, the offender could not be brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or to protect others or their property from lawlessness, the marshal would be authorized to imprison the offender, until he could be properly brought to trial. *Ib.* 452.

## IV. ASSAULT AND BATTERY.

6. *When doctrine of self-defense can not be invoked.*—In a prosecution for assault and battery, the defendant can not invoke the doctrine of self-defense, where the evidence shows that he provoked and



CRIMINAL LAW—*Continued.*

brought on the difficulty, and committed a battery on the prosecuting witness by placing a pistol against his chin in an angry and insulting manner. *Johnson v. The State*, 253.

7. *Same*.—Any one who brings on, or provokes a personal encounter, thereby disables himself from relying on the plea of self-defense in justification of a blow which he struck during such encounter. *Page v. The State*, 229.

## V. CARRYING CONCEALED WEAPONS.

8. *Can not be carried within curtilage of defendant's abode*.—Under the provisions of the act of February 19th, 1881, amendatory of section 4109 of the Code (Pamph. Acts, 1880-1, p 38), it is no defense to an indictment for carrying a pistol concealed about the person, that the defendant, at the time of the commission of the act, was within the curtilage of his own abode. No such exception is made by the statute. *Harman v. The State*, 248.
- 8a. *Admissibility of evidence*.—In a prosecution for carrying a concealed pistol, the defense being that the defendant had been threatened with, and had good reason to apprehend, an attack, it is not permissible for him to show, that a person to whom he had spoken of the threat advised him to arm himself. *John Berney v. The State*, 233.
9. *When conduct leading to arrest and discovery of crime inadmissible*. In such prosecution, disorderly conduct on the part of the defendant, which caused his arrest and led to the discovery of the concealed weapon, is irrelevant and inadmissible against him. While such conduct may have been part of the *res gestæ*, and explanatory of the arrest, yet it had no tendency to prove or disprove the charge against the defendant, but did have a tendency to prejudice the jury unduly against him. *Ib.* 233.
10. *Declaration of accused; when inadmissible*.—An offer on the part of a defendant, indicted for carrying a pistol concealed about his person, made several days before he was detected in the act, and on being informed that threats of violence had been made against him, to borrow five dollars with which to purchase a pistol, being a declaration by the accused self-serving in its character, and capable of concoction as a part of a scheme of crime, is not admissible for him. *Berney v. The State*, 220.

## VI. COSTS.

11. *Costs and fees; distinction between*.—Costs and fees are generally altogether different in their nature, the one being an allowance to a party for expenses incurred in the successful prosecution or defense of a suit, while the other is a compensation to an officer for services rendered in the progress of a cause. But in criminal cases especially, under the statute, this distinction is not observed; but all the costs which are taxable, except compensation to witnesses, consist of fees fixed by the statute for services rendered by the officers of court. *Bradley v. The State*, 318.
12. *Costs in criminal case; section 4731 of the Code, as amended, construed*.—The word *costs* when employed in reference to criminal prosecutions under our statutes, embracing *officers' fees*, the omission of these latter words from the statute amending section 4731 of the Code (Pamph. Acts 1880-81, p. 37), does not change or lessen the character of the liability which a defendant convicted of crime can be compelled to discharge by hard labor. *Ib.* 318.
13. *Hard labor; for what costs may be imposed*.—It is only costs incurred by the State, or to which the State, if it were liable for costs, could be subjected, for the payment of which a convict may be

CRIMINAL LAW—*Continued.*

compelled to labor; and hence, a defendant can not be sentenced, on conviction, to hard labor for the payment of fees due to his witnesses, or of fees due to the officers of court for services rendered to him in making his defense. *Ib.* 318.

14. *Same*; may be imposed for sheriff's fees for feeding prisoners.—The compensation of the sheriff for feeding a defendant in a criminal case, while he is confined in jail to answer the indictment, is a part of the costs in the strictest sense of the term, taxable against him on conviction, and for the payment of which hard labor may be imposed. *Ib.* 318.

## VII. COUNTY COURT.

15. *Jurisdiction of county court of Hale county.*—Under the statute conferring on the county court of Hale county "jurisdiction of all misdemeanors committed in said county" (Pamph. Acts, 1879-80, p. 295), that court has jurisdiction of a prosecution for misdemeanor, which was commenced by a warrant of arrest issued by a justice of the peace of the county, as a committing magistrate, who required the defendant to give bail for his appearance before the county court to answer the accusation. *Johnson v. The State*, 593.

## VIII. EVIDENCE.

16. *Admissibility of confessions.*—Where a confession was made at a late hour of the night to the sheriff of the county by a prisoner, who was confined in jail on the charge of murder, and who had been advised that a mob was gathering in town to rescue him from jail, and who knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him "whether he was afraid of a mob," to which he replied in the negative, and to whom the sheriff himself, in the presence of a half dozen of the guards, had stated that he was "in a bad fix," and, in reply to a question put by the prisoner, had told him that "sometimes in cases of assault and battery and similar cases, it would be best to plead guilty,"—*held*, that such confession was obtained under the combined influence of both hope and fear and was inadmissible. *Redd v. The State*, 255.
17. *Same.*—Another confession of a similar character made by the prisoner on the following morning to the jailor, when he went up to feed the prisoners, which seems to have been elicited by a question put by him to the prisoner, asking whether the prisoner had anything to say to him, is presumed to have originated from the same motives, and is inadmissible, in the absence of evidence showing, that the influence exerted upon the mind of the prisoner by the events of the previous night, had been removed. *Ib.* 255.
18. *Whether confession voluntary or involuntary, a question for the court.* It is for the court to determine whether the confessions of a prisoner are voluntary or involuntary, and the court's decision of the question can not be reviewed by the jury. Hence, a charge is erroneous which submits to the jury the decision of this legal question, and should, for that reason, be refused. *Ib.* 255.
19. *Weight of confession; in determining, the jury may consider the circumstances under which they were obtained.*—But it is equally well settled, that after confessions in any case have been admitted, the jury may consider the circumstances under which they were obtained, and the appliances by which they were elicited, including the situation and mutual relation of the parties, in the exercise of their exclusive prerogative of determining the credibility of the

CRIMINAL LAW—*Continued.*

- evidence, and the weight to which it is properly entitled in controlling the formation of the verdict. *Ib.* 255.
20. *Admissibility of confessions.*—A confession which is affirmatively shown to have been made voluntarily, though made while the defendant was under arrest, and in response to questions propounded by the officer having him in custody, is admissible evidence. *Spicer v. The State*, 159.
  21. *Criminative facts discovered by examination of prisoner's person; when admissible.*—The submission by a female defendant of her person to a private examination by physicians, is not a confession, although the result of the examination was a disclosure of facts of a criminative character; and such facts are competent evidence against her, although she was induced to submit to the examination through the assurance, that, "it would be the best thing for her that she could do." *Ib.* 159.
  22. *Admissibility of confessions.*—A confession by a defendant made in the absence of threats or promises, or other inducement to avow or disavow his guilt, is admissible, although it was made while the defendant was confined in prison, to an officer in charge of, and having authority over him, and in the absence of friends and counsel. *Jackson & Dean v. The State*, 249.
  23. *When communicated threat inadmissible.*—Where the accused is charged with murder, and there is no evidence tending to show that the fatal act was committed in self-defense; a threat made by the deceased in the presence of, and to the accused, about a week before the homicide, that before the accused should marry a certain woman, he would kill the accused, is not admissible evidence. *Green v. The State*, 6.
  24. *Same; when uncommunicated threat admissible in evidence.*—In such case, no witness having seen the parties at the instant the fatal shot was fired, but there being ground for argument at least, from the evidence, that the deceased must have taken some action in the matter of drawing his pistol before the accused fired, a threat made by the deceased while loading his pistol shortly before the rencounter, to the effect that before he would be run over by the accused he would kill the accused, or the accused would kill him, is admissible in evidence, although it was not communicated to the accused, as tending to show the *animus* of the deceased so recently before the homicide as to authorize its consideration by the jury, with the other testimony, in ascertaining the conduct of the parties immediately before the firing. *Ib.* 6.
  25. *Subscribing witness; when proof of execution of instrument must be made by.*—On the trial of a defendant indicted for a violation of section 4353 of the Code of 1876, it is error to allow the State to prove by the prosecutor, against the defendant's objection, the execution of a contract between him and the defendant, under which the lien or claim is asserted, and which is attested by a subscribing witness, without having first accounted for the absence of such witness. *Ellerson v. The State*, 1.
  26. *Intoxicating liquors; when witness may give his opinion as to the intoxicating properties of.*—In a prosecution for selling intoxicating liquors in violation of law, it is competent for a witness, who is shown to have had such an opportunity of personal observation or of experience as to enable him to form a correct opinion, to testify to his opinion as to the intoxicating properties of liquors shown to have been sold by the defendant, although he is not shown to be a technical expert. *Carson v. The State*, 235.
  27. *Admissibility of.*—In such a prosecution testimony showing how the liquors were labeled is irrelevant, as the question for the jury to de-



CRIMINAL LAW—*Continued.*

- termine in such case is, what are the *actual* properties of the liquor sold, and not what were its *represented* properties. *Ib.* 235.
28. *Declarations by accused; when inadmissible for him.*—The connection between an act *prima facie* criminal and a fact or circumstance which may excuse it, can not be shown by the declarations of the accused made prior to, and in contemplation of the act. *Berney v. The State*, 220.
29. *Admissibility of.*—Where a showing for a continuance is offered in evidence as a whole, and a part of it is inadmissible, the court is not required to examine it for the purpose of distinguishing the admissible from the inadmissible parts thereof, and of receiving the one and excluding the other, but may, on objection, exclude it entirely. *John Berney v. The State*, 233.
30. *Same.*—In a prosecution for carrying a concealed pistol, the defense being that the defendant had been threatened with, and had good reason to apprehend, an attack, it is not permissible for him to show, that a person to whom he had spoken of the threat advised him to arm himself. *Ib.* 233.
31. *When conduct leading to arrest and discovery of crime inadmissible.* In such prosecution, disorderly conduct on the part of the defendant, which caused his arrest and led to the discovery of the concealed weapon, is irrelevant and inadmissible against him. While such conduct may have been part of the *res gestæ*, and explanatory of the arrest, yet it had no tendency to prove or disprove the charge against the defendant, but did have a tendency to prejudice the jury unduly against him. *Ib.* 233.
32. *Prosecution for selling or conveying mortgaged property under section 4354 of the Code; when no variance between accusation and proof.* There is no variance between an accusation in a prosecution for selling or conveying personal property covered by written lien or mortgage, under section 4354 of the Code of 1876, pending in the county court, and the proof, where the accusation avers that the mortgage was written or printed, and the mortgage introduced in evidence was partly written and partly printed. *Johnson v. The State*, 593.

## IX. HOMICIDE.

33. *Manslaughter in first degree.*—Death caused by a blow intentionally stricken with an instrument calculated to produce death, unless shown to have been inflicted in self-defense, can never be less than manslaughter in the first degree. *Collier v. The State*, 247.
34. *When a charge is not a reversible error.*—On the trial of one indicted for manslaughter, a charge that "mere words, no matter how abusive and insulting, never reduce homicide to manslaughter," although alien to the issue and unnecessary, is without injury to the accused, and will not work a reversal of the judgment of conviction. *Ib.* 247.
35. *Conduct of deceased to be considered in determining degree; self-defense.* If the circumstances attending a homicide, caused by a pistol shot fired by the accused in a rencounter not shown to have been brought on by him, both parties being armed, are such as to create the impression that the deceased had drawn or commenced to draw his pistol before the accused drew or attempted to draw his, or if a reasonable doubt is thereby generated as to whether such was the case or not, then such conduct on the part of the deceased should be considered in determining the grade of the homicide; but the homicide can not be thereby reduced to self-defense, unless the deceased made the first hostile, dangerous demonstration, and the accused had no other reasonable mode of escape. *Green v. The State*, 6.

CRIMINAL LAW—Continued.

36. *Murder ; sufficiency of indictment.*—An indictment charging that the defendant “unlawfully and with malice aforethought, did kill Lucy Lee by strangulation in this, to-wit, that he choked her to death,” conforms substantially to the form prescribed by the Code, and is sufficiently definite as to the description of the means employed in perpetrating the killing. *Redd v. The State*, 255,
37. As to admissibility of confessions and threats, see *ante*, sub-title EVIDENCE, 5—13.
38. As to organization of jury, see *infra*, sub-title, JURORS AND JURY.

X. FALSE PRETENSES.

39. *When indictable.*—A false pretense, to be indictable, must be calculated to deceive and defraud, and must be of a material fact, on which the party to whom it is made, has the right to rely, and not the mere expression of an opinion, or of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge. *Woodbury v. The State*, 242.
40. *Want of prudence in the party to whom made, no defense.*—As a general rule, if the pretense is not absurd or irrational, or if the party to whom it is made had not, at the very time it was made and acted upon, the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense. *Ib.* 242.
41. *False statement as to location of residence, when sufficient.*—Under indictment for obtaining personal property under false pretenses, if the residence of the accused at a particular locality was a material fact in the transaction between him and the party from whom he obtained the property ; and if, with the intent to defraud such party, he misrepresented the locality of his residence, and by means of the misrepresentation obtained the property, the misrepresentation being a controlling inducement with the owner to part with the property, it is no defense, that, if the owner had taken the precaution to inquire at the particular locality, he could have found it was not the residence of the accused, and would not have been deceived and defrauded. *Ib.* 242.
42. *Must be a controlling inducement with the owner to part with his property.*—While the false pretense need not be the sole, exclusive or decisive cause operating to induce the owner to part with his property, it must be a controlling inducement to that end. If he would not have parted with his property in the absence of the false pretense, the offense is complete. *Ib.* 242.
43. *Same.*—Where, on the trial of a defendant indicted for obtaining a sewing machine under false pretenses, the evidence of the party from whom the defendant obtained the machine tended to show, that he was not influenced in parting with the machine by the false representations made to him by the defendant, a charge given at the request of the State, which assumes to state the elements of the offense, and omits all proper reference to such evidence, has an immediate tendency to mislead the jury, and is erroneous. *Ib.* 242.

XI. INDICTMENT.

44. *Murder ; sufficiency of indictment.*—An indictment charging that the defendant “unlawfully and with malice aforethought, did kill Lucy Lee by strangulation in this, to-wit, that he choked her to death,” conforms substantially to the form prescribed by the Code, and is sufficiently definite as to the description of the means employed in perpetrating the killing. *Redd v. The State*, 255.
45. *Local statute ; public in its nature ; how pleaded.*—A statute, though

## CRIMINAL LAW—Continued.

- local in its nature, which extends to all persons who might come within the territory described, is a public statute, of which the courts are required to take judicial notice without being pleaded; and an indictment charging a violation thereof is sufficient, which refers to it by its general tenor, and further describes it by the date of its approval. *Carson v. the State*, 235.
46. *When exceptions created by a proviso to an act need not be negatived.*—Where an exception is incorporated into the enacting clause of a statute, the indictment must show, by proper averment, that the defendant did not come within the operation of the exception; but where such exception is created by a proviso to the act, it is a matter of defense for the defendant to show that he did come within the exception, and this defense need not be anticipated by averment in the indictment. *Ib.* 235.
  47. *Indictment against white person and negro for living in adultery or fornication; when sufficient.*—An indictment charging that "Tony Pace a negro, or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication," sufficiently charges the offense of living in adultery or fornication, as demanded by section 4189 of the Code of 1876. *Pace & Cox v. The State*, 231.
  48. *Retailing; violation of local law; sufficiency of indictment.*—Under the statute (Code of 1876, § 4806), a defendant may be convicted of the violation of a local law prohibiting the sale of spirituous liquors, under an indictment charging that he "did sell vinous or spirituous liquors without a license and contrary to law." *Powell v. The State*, 10; *Boon v. The State*, 226.
  49. *When form prescribed by Code sufficient.*—An Indictment for selling or removing personal property covered by lien or claim (Code of 1876, § 4353), which follows the form prescribed by the Code, is sufficient. *Ellerson v. The State*, 1.
  50. *Robbery; when sufficient.*—An indictment for robbery that does not contain a distinct averment of the value of the property alleged to have been taken, is insufficient. *Jackson & Dean v. The State*, 249.
  51. *Same.*—An averment in such an indictment charging that the defendant "feloniously took one valise containing clothing of the value of twenty dollars, is an averment that the taking was of the valise and of the clothing contained therein, and that the collective or aggregate value was twenty dollars. *Ib.* 249.

## XII. JURORS AND JURY.

52. *Organization of jury; when free from error.*—Where, on the trial of a prisoner charged with murder, four of the regular jurors whose names were on the *venire* served on the prisoner were then engaged as jurors in the trial of another cause, the circuit court did not err in ordering their names, when called, to be laid aside and the names of others to be drawn in their stead, nor in ordering an additional number to be summoned as talesmen, the whole *venire* having been exhausted before the completion of the jury, from whom the panel was completed, without waiting for the return of the jurors who were so detained on the other trial. *Redd v. The State*, 255.
53. *When service of copy of indictment and venire on prisoner presumed.* Where the record in a capital case fails to show, that the prisoner, who was in actual confinement, was served with a copy of the indictment and of a list of the jurors summoned for his trial, as required by the statute, but does not show the contrary, such service will be presumed to have been regularly made, in the absence of any objection by the defendant in the lower court. *Spicer v. The State*, 159.



## CRIMINAL LAW—Continued.

54. *Failure of record to show that special venire was summoned; whether it will be presumed that sheriff discharged his duty, quære.*—Where, in a capital case, the record shows that the court made the proper order for a special venire, but fails to show that the order was executed by the sheriff, being silent on that point, and it further shows that the defendant went to trial, without objection, before a jury organized from the regular panels summoned for the week, it may be, that, in such case, it will be presumed, on appeal, that the sheriff discharged his duty by executing the order, or that the defendant waived his right to have a compliance therewith; but this question is not decided in this case. *Ib.* 159.

## XIII. LARCENY.

55. *Outstanding crop.*—Under a contract between several parties, entered into for the purpose of farming, by the terms of which one of them was to furnish the land and “necessary teams, wagons, farming implements, feed for teams and blacksmith work,” and the others were to “furnish all the labor necessary to make a crop,” and the crop was to be divided between all of them in shares fixed by the contract, the parties thereto are tenants in common of the crop raised thereunder; and hence, none of the parties furnishing the labor can be convicted of larceny of a part of the outstanding crop raised under the contract. *McCall v. The State*, 227.
56. *Petit larceny; tenants in common.*—Nor can they be convicted of larceny of any part of the crop after it has been gathered, and becomes personal property. *Holcombe v. The State*, 218.
57. *At common law, tenant in common can not be guilty of, as to joint property.*—At common law, a joint owner or tenant in common of personal property, can not be guilty of larceny, by taking or appropriating to his own use the whole or any part of the joint property, however fraudulent or felonious in fact may be his intent, unless he take it from the custody of a bailee with intent to charge the latter with a pecuniary liability. *Ib.* 218.
58. *Section 4355 of the Code construed.*—Under an indictment for larceny a tenant in common can not be convicted of the offense of having fraudulently converted to his own use the undivided interest of his co-tenant, although, under the provisions of section 4355 of the Code, one guilty of such an offense is punishable as if he had stolen the property so converted. *Ib.* 218.
59. *Outstanding crop of corn not personal property.*—An outstanding crop of corn is not personal property, and is, therefore, not protected by the provisions of section 4355 of the Code. *McCall v. The State* 227.

## XIV. PLEAS AND DEFENSES.

60. *Only one christian name known to the law.*—The law knows but one christian name, and the insertion or omission of a defendant's middle name in an indictment is entirely immaterial; and a mistake in the middle name will not support a plea of misnomer. *Pace & Cox v. The State*, 231.

## XV. RETAILING; DISPOSING OF INTOXICATING LIQUORS CONTRARY TO LOCAL STATUTES.

- 60a. *Sufficiency of indictment.*—Under the statute (Code of 1876, § 4806), a defendant may be convicted of the violation of a local law prohibiting the sale of spirituous liquors, under an indictment charging that he “did sell vinous or spirituous liquors without a license and contrary to law.” *Powell v. The State*, 10; *Boon v. The State*, 226.

CRIMINAL LAW—*Continued.*

61. *Intoxicating liquors ; when witness may give his opinion as to the intoxicating properties of.*—In a prosecution for selling intoxicating liquors in violation of law, it is competent for a witness, who is shown to have had such an opportunity of personal observation or of experience as to enable him to form a correct opinion, to testify to his opinion as to the intoxicating properties of liquors shown to have been sold by the defendant, although he is not shown to be a technical expert. *Carson v. The State, 235.*
62. *Evidence ; admissibility of.*—In such a prosecution testimony showing how the liquors were labeled is irrelevant, as the question for the jury to determine in such case is, what are the *actual* properties of the liquor sold, and not what were its *represented* properties. *Ib. 235.*
63. *Local statute prohibiting sale of liquors ; when exception in favor of physicians can not be incorporated by the courts.*—Where a local statute prohibiting the sale of spirituous, vinous or malt liquors and intoxicating bitters within a prescribed territory, contains no exception in favor of physicians and druggists, such exception can not be incorporated therein by the courts. *Ib. 235.*
64. *Same.*—Hence it is no defense to an indictment charging a sale or gift of intoxicating bitters in violation of such statute, that the defendant was a licensed practicing physician, and gave or sold them, in good faith, as a prescription, to the witness who was under his treatment, although it is shown that such was a proper and scientific treatment of the disease for which he was prescribing. *Ib. 235.*
65. *Same.*—But “we are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute.” *Ib. 235.*

See CONSTITUTIONAL LAW, 9.

## XVI. ROBBERY.

66. *Indictment ; averment of value of property taken.*—An indictment for robbery that does not contain a distinct averment of the value of the property alleged to have been taken, is insufficient. *Jackson & Dean v. The State, 249.*
67. *Same.*—An averment in such an indictment charging that the defendant “feloniously took one valise containing clothing of the value twenty dollars,” is an averment that the taking was of the valise and of the clothing contained therein, and that the collective or aggregate value was twenty dollars. *Ib. 249.*
68. *Proof of value of property taken, when sufficient.*—On a trial for robbery it is not necessary to prove that the property alleged to have been taken, had a specific pecuniary value. It is sufficient that it was not worthless, that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, although its pecuniary value was nominal, insignificant, or incapable of estimation. *Ib. 249.*
69. *What constitutes violence.*—While it may be true, that the mere stealthy taking, or the sudden, unexpected snatching of goods from the person of another, will not constitute robbery ; yet, whenever the taking is resisted, and the resistance is overcome by violence, or whenever resistance is prevented by threats of actual violence, creating a reasonable apprehension of it, the offense is committed. *Ib. 249.*

## CRIMINAL LAW—Continued.

## XVII. SELLING, REMOVING, OR BUYING PROPERTY TO WHICH OTHERS HAVE A CLAIM. (Code, § 4353)

70. *Indictment; when form prescribed by Code sufficient.*—An indictment for selling or removing personal property covered by lien or claim (Code of 1876, § 4353), which follows the form prescribed by the Code, is sufficient. *Ellerson v. The State, 1*
71. *Ingredients of the offense denounced by section 4353 of the Code of 1876.* To constitute the offense of selling or removing personal property covered by a lien or claim, it is necessary to prove, (1) that the prosecutor had a claim to the property under a written instrument or a lien thereon created by law for rent or advances, or some other lawful or valid claim, verbal or written; (2) that the accused having knowledge of the existence of such claim or lien, removed or sold the property; and (3) that he removed or sold it for the purpose of hindering, delaying or defrauding the prosecutor; and it is error for the court to refuse a charge asserting that these facts must be established by the evidence beyond all reasonable doubt, before they can convict, and that a reasonable doubt of the existence of either of these facts, growing out of the evidence, entitled the defendant to an acquittal. *Ib. 1.*
72. *Section 4353 of the Code construed.*—The words "lien" and "claim" are used in Section 4353 of the Code of 1876, prohibiting the sale or removal of personal property covered by a lien or claim, in a kindred sense, embracing mere charges or incumbrances upon the general ownership, and not the general ownership itself. *Ib. 1.*
73. *Same; when contract not protected thereby.*—The prosecutor and the defendant entered into a contract, which recites that the former had employed the latter and others to labor on a designated tract or parcel of land for the year, 1880, and in which the prosecutor stipulated to furnish the land, team and feed for the team, and tools to work the land, and seed to plant it, and the defendant stipulated to furnish the labor and feed it, to be responsible for all tools, implements and gear used by him, to treat the stock well and to do good work. It was further provided, that the prosecutor was to have one-half of the crop made, and the defendant was to have the other half, from which he was to pay all advances made to him, and for any labor to help him, if it was necessary to hire help. *Held*, that the relation between the prosecutor and the defendant under the contract, was either that of master and servant, or that of tenants in common; and that in either relation the prosecutor had a general ownership in the crops raised under the contract, and not a lien or claim within the meaning of section 4353 of the Code of 1876; and that, therefore, the defendant could not be convicted, under that section, for selling or removing a part of such crops. *Ib. 1.*

## XVIII. SELLING OR CONVEYING MORTGAGED PROPERTY. (Code, § 4354).

74. *Prosecution for selling or conveying mortgaged property under section 4354 of the Code; when no variance between accusation and proof.* There is no variance between an accusation in a prosecution for selling or conveying personal property covered by written lien or mortgage, under section 4354 of the Code of 1876, pending in the county court, and the proof, where the accusation avers that the mortgage was written or printed, and the mortgage introduced in evidence was partly written and partly printed. *Johnson v. The State, 593.*
75. *Same; statute extends to printed mortgages or liens.*—The provisions of this statute (Code, § 4354) not only extend to written mortgages,



CRIMINAL LAW—*Continued.*

- liens and deeds of trust, but also extend to, and comprehend mortgages, liens and deeds of trust which are printed, or partly printed and partly written. *Ib.* 593.
76. *The word "writing" includes printing.*—The declaration of section 1 of the Code of 1876, that "writing" includes printing on paper, is but a general rule of construction which would be applied in the absence of such statutory declaration, *Ib.* 593.
77. *Section 4354 of the Code construed; the word "convey" includes an exchange.*—The word *convey* as used in the statute making it a misdemeanor to sell or convey personal property upon which there is a written lien or mortgage, etc. (Code, § 4354), includes a transfer of property by exchange. *Ib.* 593.

## XIX. TRIAL AND ITS INCIDENTS.

78. *When service of copy of indictment and venire on prisoner presumed.* Where the record in a capital case fails to show, that the prisoner, who was in actual confinement, was served with a copy of the indictment and of a list of the jurors summoned for his trial, as required by the statute, but does not show the contrary, such service will be presumed to have been regularly made, in the absence of any objection by the defendant in the lower court. *Spicer v. The State*, 159.
79. *Failure of record to show that special venire was summoned; whether it will be presumed that sheriff discharged his duty, quære.*—Where, in a capital case, the record shows that the court made the proper order for a special venire, but fails to show that the order was executed by the sheriff, being silent on that point, and it further shows that the defendant went to trial, without objection, before a jury organized from the regular panels summoned for the week, *it may be*, that, in such case, it will be presumed, on appeal, that the sheriff discharged his duty by executing the order, or that the defendant waived his right to have a compliance therewith; but this question is not decided in this case. *Ib.* 159.
80. *Mandatory requirements of the statute; when must be complied with by the court in capital case.*—It is a reasonable and sound principle that, where, on the trial of a capital case, the statute peremptorily requires some order to be made by the court, which is of prime importance to the prisoner in securing to him the constitutional guaranty, that the "right of trial by jury shall remain inviolate," the action of the court in that regard becomes an essential part of the record, and, on appeal, it must affirmatively appear that the requirement was complied with. *Ib.* 159.
81. *Record must affirmatively show in capital case an order appointing day for trial.*—Under the provisions of the statutes of this State, the court is required to appoint a day for the trial of a prisoner indicted for a capital offense; and this requirement being mandatory, and being also an act judicial in its nature to be performed by the court, and not a duty to be discharged by a ministerial officer acting under a judicial order, the record, on appeal, must affirmatively show that it was complied with. This court will not presume from the silence of the record, that the order was made, or that the right of the prisoner thereto was waived by his proceeding to trial without objection. *Ib.* 159.

## XX. VERDICT AND JUDGMENT.

82. *Judgment of conviction in criminal case; when erroneous.*—The sentence of a court in criminal case, operating to deprive a citizen of his liberty, and condemning him to involuntary servitude, is irregular and erroneous, when it is in itself so vague and indefinite, that it may operate as a pretence of authority for prolonging the term of

CRIMINAL LAW.

- servitude beyond that to which the law gives sanction. *Bradley v. The State*, 318.
83. *Same*.—Where a defendant convicted for carrying a concealed weapon, is, in one part of the sentence, condemned to hard labor for the payment of the costs at the rate of forty cents per day, the term not to exceed eight months, and in another part, to hard labor for the same purpose for a term, not only in excess of eight months, but for a period more than sufficient for the payment of the costs, such sentence is inconsistent, uncertain, and erroneous, although the latter clause, being an excess of jurisdiction, may be void. *Ib.* 318.
84. *Hard labor; for what costs may be imposed*.—It is only costs incurred by the State, or to which the State, if it were liable for costs, could be subjected, for the payment of which a convict may be compelled to labor; and hence, a defendant can not be sentenced, on conviction, to hard labor for the payment of fees due to his witnesses, or of fees due to the officers of court for services rendered to him in making his defense. *Ib.* 318.
85. *Same; may be imposed for sheriff's fees for feeding prisoners*.—The compensation of the sheriff for feeding a defendant in a criminal case, while he is confined in jail to answer the indictment, is a part of the costs in the strictest sense of the term, taxable against him on conviction, and for the payment of which hard labor may be imposed. *Ib.* 318.
86. *When judgment of lower court here corrected*.—The defendant in this case having been sentenced to hard labor for the payment of costs for a longer period than is authorized by law, the judgment of the lower court is here corrected, and, as corrected, affirmed, without costs. *Ib.* 318.

CROPS.

1. *When growing*.—A crop must be considered and treated as a *growing* crop, from the time the seed are deposited in the ground. *Wilkinson v. Ketter*, 435.

See MORTGAGES.

DAMAGES.

1. *General rules for the recovery of damages*.—Among the general rules for the recovery of damages are the following: (1). They must be the natural and proximate consequence of the wrong done, not the remote or accidental result; (2) special damages can be recovered only when they are not too remote, and are specially declared on and claimed in the complaint; and (3) what are termed speculative damages—that is, possible or even probable profits that, it is claimed, could have been realized, but for the tortious act or breach of contract charged against the defendant—are too remote and can not be recovered. *Pollock & Co. v. Gantt*, 373.

See ATTACHMENT BOND, 5—7, 10, 11, 13.

CHANCERY, 20—24, 70, 71.

RAILROAD.

TROVER.

WARRANTY.

DEEDS.

1. *Execution of*.—A conveyance of lands, not acknowledged by the grantor or as required by law, must be attested by at least one witness, and, if the grantor signs by mark only, by two witnesses; and in

DEEDS—*Continued.*

- either case the attesting witness must be able to write, and must in fact write his own name. *Stewart v. Beard*, 470.
2. *Same*.—A deed, signed by the grantor, but not acknowledged, and purporting to be attested by two witnesses, one of whom signed by mark only, and the name of the other was written by the grantor, is insufficient to pass the legal estate, and is incapable of recognition in a court of law as a muniment of title. *Ib.* 470.
  3. *When execution of neither attested nor acknowledged*.—Where a mortgage was signed by the husband, and beneath his signature thereto the wife on the same day added: "I hereby join in the execution of the foregoing conveyance, in token that I relinquish all claim of dower in said premises," affixing her signature and seal; to which a justice of the peace added a certificate in these words: "Sworn to and subscribed before me this day," bearing date seventeen days after the mortgage,—*held*, that the mortgage was neither attested nor acknowledged, and that it was, therefore, inoperative for any purpose. *Dugger & Collins v. McRae*, 324.
  4. *Same; execution of*.—The face of such paper clearly indicates that the certificate of the justice of the peace refers to the signature of the wife, which last precedes it, and not to that of the husband. *Ib.* 324.
  5. *Same; when not self-proving, admission by mortgagor of its execution no evidence against stranger*.—A mortgage of land, to be self-proving under the statute, must be properly acknowledged and certified, and recorded in the county in which the land is situate, within twelve months after its execution; and when not acknowledged, an admission of its due execution by the mortgagor, while sufficient as against him, is no evidence against a stranger claiming an interest in the land. *Ib.* 324.
  6. *Acknowledgment of; its effect when attacked for fraud*.—Where a mortgage is duly acknowledged before, and certified by a proper officer, in the form prescribed by the statute, this is, in itself, cogent proof of a free agency and absence of restraint in the execution of the mortgage, and raises a presumption in favor of its validity, which can only be rebutted by clear proof of fraud; duress, or imposition practiced on the mortgagor, in which the officer or mortgagee participated. *Moog v. Strang*, 98.
  7. *Delivery of deed can not be qualified by parol*.—When the possession of a deed to lands is obtained by the grantee from, and by the act of the grantor, or with his consent, it is not permissible for the grantor to prove by parol that the delivery of the deed was conditional or qualified, and not absolute. Any parol negotiation or agreement antecedent to, or contemporaneous with the delivery of the deed, is merged in the delivery, and from that time the conveyance becomes operative according to its terms. *Williams v. Higgins*, 517.
  8. *Deed; when want or inadequacy of consideration can not be shown*.—Where a deed purports to be founded on a pecuniary consideration, it is not competent for the grantor, in the absence of fraud in its execution, to show in a court of law the want, or inadequacy of the consideration expressed in the deed. *Ib.* 517.
  9. *Same; deed fraudulent as to creditors, operative inter partes*.—Conveyances or gifts made to hinder, delay or defraud creditors, when fully consummated, are valid and operative between the parties; and neither party can set up the fraud for the purpose of maintaining, or defeating an action brought by the one against the other. *Ib.* 517.
  10. *Failure to record deed to land; its effect against subsequent encumbrancer*.—The failure to record a deed conveying lands until more than three months after its execution, and until the vendor has con-



DEEDS—*Continued.*

- veyed the lands in mortgage to secure a debt contracted contemporaneously with the execution of the mortgage, is void and inoperative against the mortgagee, he having no notice of the existence of the deed. *Lehman, Durr & Co. v. Shook*, 486.
11. *Registration of deed ; effect of as notice.*—The registration of a deed operates as notice only of rights or claims derived from the grantor by whom the deed is executed, and not as notice of claims or rights derived from others not parties to the deed. *Lehman, Durr & Co. v. Collins*, 127.
  12. *Same.*—Where a purchaser of lands at a sale under a power contained in a mortgage subsequently sold the lands, but did not execute to his vendee any deed thereto, the latter taking a conveyance directly from the mortgagor, the registration of such conveyance does not operate as constructive notice to judgment creditors seeking to redeem the lands, of such vendee's claim or title to the lands, and to him they are not required to apply for redemption in the absence of actual notice. *Ib.* 127.
  13. *Description in conveyance ; when it can be aided by oral testimony.* A description of lands in a conveyance, by section, township and range, without mention of the State, county, land district, or government survey, in which the lands lie, may be aided by oral testimony showing, that when the conveyance was made, the grantor owned and resided on lands in a given county, in this State, which were known by the same numbers, as those employed in the conveyance. Aided by such proof, and in absence of proof, that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce the conveyance valid. *Chambers v. Ringstaff*, 140.
  14. *Interpretation of a conveyance, aided by oral testimony.*—In such case, the interpretation of the conveyance and judgment upon its validity *vel non*, are questions for the court, while the finding of attendant facts and circumstances are functions of the jury. *Ib.* 140.
  15. *Intention of parties ; can not be testified to.*—It is not permissible for a party to a suit, who was also a party to a mortgage, to testify, as a witness, to the *intention* of the parties to such mortgage as to what lands were to have been thereby conveyed. *Ib.* 140.
  16. *When description of grantor sufficient.*—The description of the grantor in a mortgage of real estate is sufficiently certain, if his identity can be worked out through a proper application of the maxim, *Id certum est quod certum reddi potest*. *Madden v. Floyd*, 221.
  17. *Same*—A mortgage of real estate is not void for uncertainty in the description of the mortgagor, which is signed by three persons, no one of whose names appears therein except at the place of signing, otherwise than under the general designation of the pronouns "I," "my" and "me," when the note secured thereby is particularly described in the mortgage, and it is manifest, on construing the note and mortgage together, who the person is that was intended to be described in the mortgage as the maker thereof. *Ib.* 221.
  18. *Voidable when obtained by undue influence.*—Where the execution of a deed is procured by undue influence, the deed is voidable merely, and not absolutely void. *Shipman v. Furniss*, 555.
  19. *Deed of homestead ; when void.*—A deed, executed by a married man of his homestead after the constitution of 1868 went into effect, without the voluntary signature and assent of his wife, is void as a conveyance of the legal title, although the deed was executed in payment of a debt contracted by him in 1859; and it will not, therefore, support an action of ejectment brought by the grantee, after the death of the grantor, against the surviving widow of the latter, for the recovery of such homestead. *Slaughter v. McBride & Latimer*, 510.

DEEDS—*Continued.*

20. *Sale by administrator acting under void appointment, also void.*—A sale of real estate, made by one acting as administrator *de bonis non* under a void appointment, is void, and a deed executed by him in pursuance of such sale, does not convey the legal title to the purchaser; but such title remains in the heirs of the decedent, and will support an action of ejectment brought by them against the purchaser in possession. *Allen v. Kellam*, 442.
21. *When deed by widow conveying decedent's land under special act valid.* An act of the General Assembly authorizing the widow to sell lands of a decedent at private sale, subject to the approval of the judge of probate of the county in which the decedent resided at the time of his death, is constitutional; and a sale and conveyance made by the widow, and approved by the judge of probate under the act, passed the legal title to the purchaser. *Bruce v. Bradshaw*, 360.
22. *Declaring naked trusts no estate or interest passes to the trustee.*—Under the statute abolishing naked or dry trusts (Code of 1876, § 2185), the legal and equitable estates, which a conveyance to a naked trustee would have created at common law, are directly and immediately merged in the *cestui que trust*, and no interest or estate passes thereunder to the trustee. *Wilkinson v. May*, 33.

See AMBIGUITY.

ADVERSE POSSESSION, 16, 17.

CHANCERY, 5-7, 10-14.

COLOR OF TITLE.

FRAUDULENT CONVEYANCES.

## DETINUE.

1. *When breach of contract by the seller of personal property will prevent a recovery based on a forfeiture.*—Where the plaintiff in an action for the recovery of chattels in specie, consisting of a steam saw and grist mill and appurtenances, claims under a forfeiture contained in a contract of sale made by him, as seller, with the defendants, as purchasers, and based on a default in payment of part of the purchase money, and it is shown that, in violation of a clause in the contract, he failed to furnish the purchasers with certain timber privileges, he can not recover. *Hill v. Townsend & Eubanks*, 286.
2. *What title will not support.*—A mortgage on a crop to be afterwards planted, unlike a growing crop, does not pass to the mortgagee the legal title, but creates only an equitable lien, which will not support an action of detinue for the recovery of the crop after it has matured and been gathered, until, at least, there has been a delivery under the mortgage. *Wilkinson v. Ketter*, 435; *Collier & Son v. Faulk & Martin*, 58; *Mayer & Co. v. Taylor & Co.*, 403.

## DEVISE.

See LEGACY.

## DISCONTINUANCE.

1. *What operates as.*—In this State, on the commencement of a common law action, it is the duty of the clerk to place it on the docket, and afterwards to continue it there from time to time, until it is disposed of by some order of the court; and his mere failure to continue the caused on the docket, unless caused by some positive act of the plaintiff, or by his omission to perform some precedent

DISCONTINUANCE—*Continued.*

duty enjoined on him by law, does not work a discontinuance. But, if the cause is kept off the docket by the act of the plaintiff, or by his failure to perform a duty preliminary to the right to have it placed on the docket, this will amount to a discontinuance. *Ex parte Holton*, 164.

2. *Effected by change of venue*—The effect of a change of venue regularly granted, is the discontinuance of the suit in the court in which it was brought; and thereupon the cause passes out of the jurisdiction, and off the docket of that court; and unless it is transferred to the court to which the change was made and docketed there, it ceases to have a place in any court. *Ib.* 164.
3. *Same*.—A plaintiff in an action of forcible entry and detainer pending in the circuit court, obtained a change of venue, but neglected for about seven years to prepay the messenger's fees to transport the papers in the cause to the court to which the change was made, or to tender the same, and by reason of such neglect, the papers did not reach the latter court until about seven years after the order for the change of venue was entered, and during that time the cause remained off the docket; *held*, that this wrought a discontinuance of the cause; and this court, on defendants' petition, awarded a *mandamus* compelling the circuit judge to strike the cause from the docket, he having refused to do so on motion made by defendants. *Ib.* 164.
4. *Same; when party not estopped from claiming*.—In such case, the defendants are not estopped from claiming a discontinuance, by the fact that a third party, under whom they held, as tenants, had obtained an injunction restraining the plaintiff from a further prosecution of the suit. *Ib.* 164.

## DIVORCE.

See CHANCERY, 3, 4.

## DOMICIL.

1. *Change of; what constitutes*.—A domicile once acquired is presumed to continue until a new one has been gained *facto et animo*. An intention to remove, or steps taken preparatory to removal, is not a change of domicile. *Bragg v. The State*, 204.

See CRIMINAL LAW, 1.

## DOWER.

1. *When widow of freedman entitled to, under ordinance of September 29th, 1865*.—Under the ordinance of 29th September, 1865, the marriage of two negroes, who intermarried in 1847, while they were both slaves, and who continued to live together as man and wife until their emancipation, and thereafter for several months after the adoption of the ordinance, was legalized, and on the death of the man, the woman, as his widow, was entitled to dower in his lands, although the man, in October, 1866, abandoned her, procured a marriage license and married another woman, with whom he lived as his wife until his death. *Washington v. Washington*, 281.
2. *Right of widow to dissent from will of deceased husband strictly personal*.—The statute authorizing the widow to dissent from the will of her deceased husband, and in lieu of the provisions thereby made for her, to take her dower in his lands, and her distributive share in his personal estate (Code, § 2293), confers on the widow a strictly personal right, which can not be exercised by another. *Crenshaw v. Carpenter, Ex'r*, 572.



DOWER—*Continued.*

3. *Right to dissent can not be exercised for insane widow by next friend.* A widow who is insane, is mentally incapable of entering such dissent; and a dissent entered for her by another, as next friend, is without authority of law, and invalid. *Ib.* 572.
4. *Same; whether chancery court has power to exercise the right for her—quære.*—Whether the chancery court, on a bill filed within proper time, has the power of dissent, on behalf of a widow who is insane, from the will of her deceased husband,—*quære.* *Ib.* 572.

## EJECTMENT.

1. *Right of recovery not affected by parol agreement.*—In ejectment it is not necessary for the plaintiff to offer to rescind a parol exchange of lands made between those under whom he and the defendant respectively hold, as a condition precedent to the commencement of his suit. In such case, the plaintiff having the legal title to the land sued for, and his claim thereto not being barred, he is entitled to recover, notwithstanding such parol agreement. *Alexander v. Wheeler*, 332.
2. *Title in plaintiff at time of trial necessary to a recovery.*—To recover in ejectment, the plaintiff must not only have title when he institutes his suit, but also at the time of trial. If his title determines before the trial, he can not recover. *Bruce v. Bradshaw*, 360.
3. *When estoppel in pais no defense.*—In ejectment brought by the heir against the purchaser at a void sale made by the administrator of the intestate's estate, the heir is not estopped from a recovery by reason of the fact that he was present at the sale and made no objection, or because the proceeds of the sale went to his use. *Allen v. Kellam*, 442.
4. *By mortgagor against a stranger; mortgage no defense.*—A defendant in ejectment can not set up, in the defense of a suit brought by a mortgagor, the outstanding title in the mortgagee, with which he does not connect himself. *Ib.* 442.
5. *Color of title and good faith under section 2966 of the Code.*—A deed made by one acting as administrator under a void appointment, though void itself, is color of title within the meaning of section 2966 of the Code of 1876, providing that persons holding under color of title, in good faith, are not responsible for damages or rent, in actions for realty, for more than one year before the commencement of the suit, when, on its face, it appears to convey a good title, and its defects are made manifest only by proof of extrinsic facts. *Ib.* 442.
6. *What title will support.*—Ejectment can only be maintained on a legal title and right to the immediate possession. *Slaughter v. McBride & Latimer*, 510.
7. *Void deed of homestead will not support.*—A deed, executed by a married man of his homestead after the constitution of 1868 went into effect, without the voluntary signature and assent of his wife, is void as a conveyance of the legal title, although the deed was executed in payment of a debt contracted by him in 1859; and it will not, therefore, support an action of ejectment brought by the grantee, after the death of the grantor, against the surviving widow of the latter, for the recovery of such homestead. *Ib.* 510.
8. *Revivor against heirs and personal representative.*—In ejectment, on the death of the defendant in possession, the right to revive the cause against the heirs for the recovery of the possession of the lands sued for, or against the personal representative for the recovery of mesne profits or rents, must be asserted within eighteen months after the death of the defendant, or it will be lost; and when lost, no recovery can be had in that action. *Ex parte Sayre*, 184.
9. *What can not be regarded as a motion to revive.*—In ejectment, when

EJECTMENT—*Continued.*

the death of the defendant in possession "is suggested and proved, and leave granted to plaintiff to revive the suit against his personal representative," the minute-entry neither giving the name of the personal representative, nor adding "when known," this can not be regarded even as a motion to revive; and if no other steps to revive are taken in the cause until after the lapse of eighteen months from the death of the defendant, the right to revive having been thereby lost, the court may, on motion, strike the cause from the docket. *Ib.* 184.

10. *Plea of not guilty a waiver of a disclaimer.*—In ejectment a plea of not guilty, being an admission of possession by the defendant, is, under our practice, a waiver of a disclaimer also filed by the defendant touching the same land. *Alexander v. Wheeler*, 332.
11. *Plea of statute of limitations also a waiver of a disclaimer.*—For similar reasons, it is not permissible to set up by special plea, the statute of limitations under an adverse possession, and accompany it with a disclaimer, unless they are made applicable to entirely different parts of the premises sued for. In such case the disclaimer is also waived. *Ib.* 332.
12. *Verdict of jury; when void for uncertainty.*—While a general verdict in favor of the plaintiff in an action of ejectment, for the lands described in the complaint, is sufficient; yet, when the verdict is for a part only of such lands, or the finding has no reference to the description given in the pleadings, the boundaries of land recovered must be designated with reasonable certainty, so as to enable the court to pronounce judgment thereon. Otherwise it is void for uncertainty, and can not be sustained. *Ib.* 332.
13. *Same.*—A verdict in favor of the plaintiff for "the land running to Fergusson and Allen line," there being nothing in the pleadings to aid the description, is void for uncertainty, and can not support a judgment of recovery. *Ib.* 332.

See ADVERSE POSSESSION.

## ELECTIONS.

1. *Supervisors of election; their powers and duties.*—The board of supervisors under the election law (Code of 1876, § 292) have no revisory powers, but their duties are purely ministerial and are confined to mere computation. They are governed by the returns made by the inspectors of the several precincts as to the number of votes cast, and for whom cast; and if these returns be in form, they have no power to go behind them and ascertain the qualifications of the voters; but they must add together the votes of the several precincts cast for each candidate, as the same are shown in the certified returns, and declare the result; and the declaration of the result made by them establishes a *prima facie* case of election. *Leigh v. The State ex rel. O'Bannon*, 261.
2. *Election under local option law; contest thereof.*—The local option law of Calhoun and other counties, approved March 19th, 1875 (Pamph. Acts, 1874-5, p. 276), containing no provision for contesting elections held thereunder, if there be irregularities in such elections, not apparent on the face of the proceedings or return, statutory contest is not the mode of inquiring into, or correcting them. *Savage v. Wolfe*, 569.
3. *Same; purely statutory.*—The authority for holding such elections is statutory, and outside of the general jurisdiction of any court; and to set such proceedings in motion, there must be presented to the judge of probate of the proper county the sworn petition of some resident freeholder of the limits, within which prohibition is sought

ELECTIONS—*Continued.*

to be established, which must contain every material averment specified in the first section of the act. *Ib.* 569.

4. *Same; application to revoke order establishing prohibition.*—While this act provides that, after prohibition has been established, a second election may be applied for and ordered at the instance, and on the petition “of any freeholder within such limits [who] desires to have the order revoked,” there is an express limitation on the right to make this second application, the statute providing that it can only be made “after the expiration of twelve months after the prior election;” and a petition seeking a revocation of the order establishing prohibition, which shows on its face that it was filed within twelve months after the first election, is wanting in a material jurisdictional averment, fails to put the statutory jurisdiction of the judge of probate into exercise, and the proceedings based thereon are *coram non judice*, and void. *Ib.* 569.
5. *Same; when proceedings for an election thereunder should be quashed.* Where a second election was held under the act to revoke the order establishing prohibition, based on a petition which shows on its face that it was filed within twelve months after the first election, the judge of probate should have quashed the proceedings, on the petition or remonstrance of a freeholder of the territory within which the prohibition was established, averring that “the order authorizing said election was granted before the time allowed by law;” and on appeal from a judgment rendered by him dismissing such petition or remonstrance, this court will reverse the judgment, dismiss the petition for the second election, and quash the proceedings thereon. *Ib.* 569.

See CONTESTED ELECTIONS.

## EMINENT DOMAIN.

See RAILROADS.

## EQUITY.

See CHANCERY.

## ERROR AND APPEAL.

1. *To what term appeals returnable.*—An appeal taken to this court during vacation should be made returnable to the next ensuing term, and if not so taken, the appeal may be dismissed, on motion. An appeal taken during the session of the court may be made returnable to the first Tuesday of any succeeding month of the term, if there are ten days intervening between the taking of the appeal and the return day; and if such appeal is made returnable generally, it is irregular. *Robinson v. Murphy*, 543.
2. *Practice on appeal; when irregularity in taking an appeal is waived.* Such an irregularity may be cured by amendment, on objection made before a submission of the cause; and if the appellee appear and join in submitting the cause for decision upon the errors assigned, the irregularity is thereby waived, and the waiver can not be withdrawn without the appellant’s consent. *Ib.* 543.
3. *Same; assignment of error; when sufficient.*—An assignment of error averring that “the court below erred in the final decree rendered” on a stated day, although very general in terms, conforms to the long practice in this court; and it must be accepted as conforming to the rules of practice, when the decree of the chancery court is assailed as erroneous in the whole. This case distinguished from *Alexander v. Rea*, 50 Ala. 452, on this point. *Ib.* 543.
4. *Error in register’s report.*—When error in register’s report to which



ERROR AND APPEAL—*Continued.*

- an exception had been reserved, here corrected. *Lehman v. Levy*, 48.
5. *Decree dismissing bill absolutely ; when here corrected*:—A decree of the chancery court dismissing a bill on account of a fatal variance between the allegations and proof, which may possibly be remedied by amendment, will, on appeal, be reversed by this court, and a decree here entered dismissing the bill without prejudice. *Munchus v. Harris*, 506.
  6. *Opportunity to amend in lower court*.—A decree rendered in vacation on demurrer, dismissing the bill, without first affording the complainant an opportunity to amend, is erroneous, and, on appeal, this court will reverse the decree and remand the cause, that the appellant may amend his bill, if he so elect. *Kingsbury v. Milner*, 502.
  7. *Presumption in favor of chancellor's conclusion on facts ; when indulged in*.—Where there is a conflict in the testimony, the conclusion of the chancellor thereon will not be disturbed, unless this court is clearly convinced that such conclusion is erroneous. *Folmar v. Folmar*, 84.
  8. *Hearing before cause at issue ; when not an error available on appeal*. While it is erroneous to proceed in a court of equity to the taking of testimony, and to a hearing before the cause is at issue as to one of the defendants ; yet, if this error is committed through the complainant's fault, it will not be available to him in this court on an appeal taken by him. *Vaughan v. Smith*, 92.
  9. *What not a ground of assignment of error on appeal from interlocutory decree*.—The irregular and erroneous rendition of a decree *pro confesso* can not be assigned as error on an appeal taken by a defendant, under the statute, from an interlocutory decree of the chancery court, overruling a motion to dismiss the bill for want of equity. *Madden v. Floyd*, 221.
  10. *Appeal from interlocutory rulings of circuit court ; can not be taken without consent of opposite party*.—Section 3917 of the Code of 1876 authorizes appeals from the interlocutory rulings of the circuit court therein enumerated, to be prosecuted only on the condition precedent that "the consent of the opposite party, or his attorney is obtained to its being taken." An appeal taken from such rulings without the consent of the opposite party or his attorney, must be dismissed for want of jurisdiction in this court. *Crumley Bros. v. Bryan & Co.*, 91.
  11. *Errors committed on trial ; when not healed*.—The mere fact that an issue is found in the record, which, under the evidence, might have been the basis of a general charge in favor of the appellant, if it had been requested, does not heal errors which the court committed in charging the jury on other issues. *Snow v. Schomucker Manuf. Co.*, 111.
  12. *When judgment of lower court here corrected*.—The defendant in this case having been sentenced to hard labor for the payment of costs for a longer period than is authorized by law, the judgment of the lower court is here corrected, and, as corrected, affirmed, without costs. *Bradley v. The State*, 318.

See CRIMINAL LAW, 52, 53, 76-79.

## ESCROW.

1. *Deposit of title deeds to lands as security, void under statute of frauds*. The doctrine of the English Court of Chancery, that a deposit of the title deeds to lands for security of a debt is an equitable mortgage, is in violation of the statute of frauds, and can not be maintained in this State. *Lehman, Durr & Co. v. Collins*, 127.

## ESTATES OF DECEDENTS.

1. *Lands of decedent ; title in heirs subject to administration.*—Under our statutes, as at common law, the title to lands, on the death of the ancestor, descends immediately to the heir at law ; but unlike the rule of the common law, it does not vest in the heir absolutely, but the descent may be intercepted, and the possession claimed and held by the personal representative, for the purposes of administration. *Nelson, Ex'r v. Murfee, 598.*
2. *Proceeds of sale of land for payment of debts in hands of personal representative ; its qualities.*—While money acquired by the personal representative from the sale of lands, for payment of debts, and remaining in his hands for distribution after paying the debts, will be treated as having the qualities of land for certain purposes of administration and succession, for all other purposes it is only money in the hands of the administrator ; and any process or procedure to get it out of his hands, must necessarily be that which is adapted to the recovery of money as money. *Ib. 598.*
3. *Same ; personal representative has priority over heir's other creditors.* When a surplus of money thus acquired remains in the hands of the personal representative for distribution, he is entitled to retain the share of an heir or distributee in such moneys in payment of a debt which the latter owes to the decedent's estate, as against, and in preference to the claim of a judgment creditor of such heir or distributee. *Ib. 598.*
4. *Same ; power of personal representative to sell.*—Among the unquestionable powers conferred upon the personal representative, is the right to petition for, and obtain an order, to sell the lands of the decedent for the payment of debts ; and when this right is asserted, and the lands are sold and conveyed under the order thus obtained, the title to the land which had descended to the heir, is completely divested ; and notwithstanding the heir may have sold and conveyed lands, or they may have been sold and conveyed as his property, the title the personal representative conveys, is not in the least impaired. *Ib. 598.*
5. *When heir a debtor to ancestor, whether administrator has a prior right to lands descended, quære.*—When the heir is indebted to the estate of the ancestor, and is insolvent, whether the administrator has any prior right to demand payment out of the lands descended, which remain unsold, or whether it becomes a mere race of diligence between him and other creditors of the heir, is a question not raised in this case ; and while the court "is not prepared to admit it becomes a mere race of diligence," the question is left open and undecided. *Ib. 598.*

See EXECUTORS AND ADMINISTRATORS.

## LEGACY AND DEVISE.

## ESTOPPEL.

1. *When party not estopped from claiming discontinuance.*—Where a plaintiff in an action of forcible entry and detainer pending in the circuit court, obtained a change of venue, and by reason of his fault the transcript and papers in the cause were not filed in the court to which the cause was removed for several years, thereby causing a discontinuance of the suit, the defendant is not estopped from claiming the discontinuance by the fact that a third party, under whom he holds as tenant, had obtained an injunction restraining the plaintiff from a further prosecution of the suit. *Ex parte Holton, 164.*
2. *Ejectment ; when estoppel in pais no defense.*—In ejectment brought

ESTOPPEL—*Continued.*

by the heir against the purchaser at a void sale made by the administrator of the intestate's estate, the heir is not estopped from recovery by reason of the fact that he was present at the sale and made no objection, or because the proceeds of the sale went to his use. *Allen v Killam*, 442.

## EVIDENCE.

## I. ADMISSIBILITY AND RELEVANCY.

1. *Ownership of personal property a fact to which a witness may testify.* Ownership of personal property is a fact, to which a witness may testify; but on cross-examination such witness can be required to state the particular facts, on which the claim of ownership rests. *Daffron v. Crump*, 77.
2. *Intention of parties to mortgage; can not be testified to.*—It is not permissible for a party to a suit, who was also a party to a mortgage, to testify, as a witness, to the *intention* of the parties to such mortgage as to what lands were to have been thereby conveyed. *Chambers v. Ringstaff*, 140.
3. *Admissibility of.*—Where a showing for a continuance is offered in evidence as a whole, and a part of it is inadmissible, the court is not required to examine it for the purpose of distinguishing the admissible from the inadmissible parts thereof, and of receiving the one and excluding the other, but may, on objection, exclude it entirely. *John Berney v. The State*, 233.
4. *When written instrument self-proving.*—Where the execution of a written instrument, which is the foundation of the suit, is not denied by sworn plea, it is, under the statute, admitted of record by the defendant, and must be received in evidence without proof of its execution. *Rich v. Thornton*, 473.
5. *When not self-proving, admission by mortgagor of its execution no evidence against stranger.*—A mortgage of land, to be self-proving under the statute, must be properly acknowledged and certified, and recorded in the county in which the land is situate, within twelve months after execution; and when not acknowledged, an admission of its due execution by the mortgagor, while sufficient as against him, is no evidence against a stranger claiming an interest in the land. *Dugger v. Collins & McRae*, 324.
6. *When prior attachments admissible on trial of action on attachment bond.*—It is competent for a defendant to prove, for the purpose of affecting the recovery of exemplary or vindictive damages, that prior to the issuance of his attachment, his agent by whom it was sued out, had notice that other creditors of the plaintiff had, on that day, obtained attachments against him on the same ground as that alleged in defendant's attachment. But such testimony can not affect the actual damages which the plaintiff is entitled to recover. *Pollock & Co. v. Gantt*, 373.
7. *Agent's authority to sell; repudiation of, by principal.*—In an action of trover brought by a mortgagee against a party who claims to have purchased from the mortgagor as the agent of the mortgagee, it is competent for the plaintiff to show a prompt repudiation of the mortgagor's alleged authority to sell, and the absence of such acquiescence as might have been construed into a ratification of the sale. And for this purpose, the debt secured by the mortgage being for rent and advances due from the mortgagor, as tenant, to the mortgagee, as landlord, the fact, that the latter had sued out an attachment against the former for the recovery of such rent and advances, is relevant, and the writ of attachment is admissible in evidence for the sole purpose of showing this fact. *Burks v. Hubbard*, 379.
8. *Subscribing witness; when proof of execution of instrument must be*



EVIDENCE—*Continued.*

*made by.*—On the trial of a defendant indicted for a violation of section 4353 of the Code of 1876, it is error to allow the State to prove by the prosecutor, against the defendant's objection, the execution of a contract between him and the defendant, under which the lien or claim is asserted, and which is attested by a subscribing witness, without having first accounted for the absence of such witness. *Ellerson v. The State*, 1.

9. *Divorce under section 2687 of Code.*—If, on bill filed by the wife against the husband for a divorce under section 2687 of the Code of 1876, there is proof personal violence, actual or threatened, insulting or offensive language is competent evidence in aid of it. *Folmar v. Folmar*, 84.

See CRIMINAL LAW, sub-title, EVIDENCE.

## II. ADMISSIONS; HEARSAY; RES GESTÆ.

10. *Account rendered; implied admission from silence.*—Where an account is rendered by a creditor to a debtor, to which no objection is made by the latter after having a reasonable opportunity to examine it; or where the latter retained it an unreasonable length of time without objection, ordinarily his silence will be treated as an implied admission of the justness of the debt, the inference of its correctness being more or less strong according to the circumstances of the particular case. *Hirschfelder, Adm'r, v. Lery & Co.*, 351.
11. *Statement of account; when allowed to go to the jury.*—In an action on an account, where it is shown, that the creditor had rendered to the debtor a statement of the account, which was a correct copy from the creditor's books, and to which the debtor made no objection, it is competent for a witness, who has knowledge of the fact, to testify that a statement of an account, purporting to be owing from the debtor to the creditor, shown him on the trial, is a correct statement from the creditor's books. In such case, the statement is a memorandum of the facts contained in the statement rendered the debtor; and though not technically evidence, it may go to the jury as a memorandum of facts in evidence before them, to aid their memory as to the testimony of witnesses. *Ib.* 351.
12. *Account rendered; notice to produce not required.*—A statement of an account sent by a creditor to a debtor is not regarded as an instrument of writing, requiring notice to be given the debtor to produce it, before oral testimony as to its contents can be received. *Ib.* 351.
13. *Admissibility of declarations.*—While, as a rule, on the trial of the right of property, the declarations or admissions by the defendant in execution, made in the absence of the claimant, are hearsay and not admissible evidence; yet, declarations by parties in possession of personal property explanatory of their possession, constitute a part of the *res gestæ*, and may be given in evidence, no matter who are the parties to the suit. Such declarations, however, must not go beyond the time at which they are spoken. *Daffron v. Crump*, 77.
14. *Suit on attachment bond; what declaration admissible.*—Where one of the assignments of the breaches of the condition of the bond in a suit thereon, is that the attachment was vexatiously and maliciously sued out, it is competent for the plaintiff to prove, that after the writ was sued out, the defendant, at whose suit it was issued, told the plaintiff that he had more money to spend on the law-suit than the plaintiff had. *Dothard v. Sheid*, 135.
15. *Proposition of compromise of pending suit inadmissible.*—The testimony of a witness to the effect, that after the commencement of a suit in ejectment the plaintiff and defendant mutually agreed that

## EVIDENCE—Continued.

he might survey a disputed boundary line, and that each party would abide by the result of such survey, and pay half the costs, tending merely to show; as it does, a proposition of compromise, is inadmissible. *Alexander v. Wheeler*, 332.

16. As to the admissibility of confessions and threats in criminal cases, see CRIMINAL LAW, 16-24.

See, also, CRIMINAL LAW, 31.

## III. BURDEN OF PROOF.

17. *On question of adverse possession.*—Adverse possession is a fact which must be proved, and the burden of proof is always cast upon him who interposes, and relies on it as a defense. *Alexander v Wheeler*, 332.
18. *Same.*—But an actual occupancy and substantial enclosure of land by a defendant, or by those under whom he derives title, or possession, accompanied by acts of ownership inconsistent with the ownership of another, is presumptively adverse possession, but is liable to be rebutted by proof to the contrary. *Ib.* 332.
19. *Party in possession of mortgaged personal property; onus on him to show that his possession is rightful.*—Where personal property covered by mortgage is traced into the possession of a party who had constructive notice of the mortgage, and he seeks to defend his possession by showing that it was rightful, the burden rests upon him to prove his defense. And if he seeks to do this, by showing a purchase of the property from the mortgagor acting as the agent of the mortgagee, he must show that the mortgagor, as such agent, had authority to sell, and that, in making the sale, the authority conferred upon him by the mortgagee was strictly followed; and that, if such authority was restricted to a sale for cash, cash was in fact paid for the property. *Burks v. Hubbard*, 379.
20. *Undue influence between parties living in illicit sexual relations.* Where one, living in illicit sexual relations with another, gives to such person property of considerable value, especially where the donor, in making the gift, excludes natural objects of his bounty, the transaction will be viewed by a court of equity with such suspicion, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. *Furniss v. Shipman*, 555.

## IV. MATTERS JUDICIALLY KNOWN.

21. *Land numbers; when judicially known.*—This court judicially know, that there is but one range 18 in this State, and that lies east of the basis meridian of St. Stephens; and that there is but one township 12 that bisects range 18, and that is north of the base of that survey. *Chambers v. Ringstaff*, 140.

## V. OBJECTIONS.

22. *General exception to evidence, part of which is legal.*—A general objection and exception to testimony, a part of which is legal and admissible, may be overruled, although another part thereof may be illegal and inadmissible. *Chambers v. Ringstaff*, 140.
23. *Exception to rejection of evidence; when can not be sustained.*—An exception to the rejection of evidence can not be sustained, unless it is shown that the evidence was legal and relevant; and if that be not shown, the presumption will be made, if necessary to support the judgment of the lower court, that it was rejected because illegal or irrelevant. *Rick v. Thornton*, 473.

## EVIDENCE.—Continued.

## VI. OPINIONS; LEGAL CONCLUSIONS.

24. *Market price of property; how proved.*—The market price of property being a conclusion which is largely made up of presumptions, may always be proved by the opinions of witnesses, based, of necessity, in part at least, on hearsay. *Burks v. Hubbard*, 379.
25. *Credit as a collective fact to which witness may testify.*—Good or bad credit is a conclusion of fact, partly based on opinion, founded more or less on reputation; and to credit, as a fact, any witness shown to possess sufficient knowledge of the subject, may testify; but such witness can not speak of its value in dollars and cents, that being a matter of inference for the jury to determine. *Pollock & Co. v. Gantt*, 373.
26. *Extent of merchant's business; when a fact to which a witness may testify.*—A witness may testify to the extent of a merchant's business, and the rate or average of profits he may realize on sales, above expenses, if within his knowledge; but he can not give his judgment or opinion as to the extent of loss a merchant will suffer by the breaking up of his business. Such question is dependent on so many elements of fact and circumstance, that any estimate that might be attempted, would necessarily be opinion or conclusion. *Ib.* 373.
27. *Intoxicating liquors; when witness may give his opinion as to the intoxicating properties of.*—In a prosecution for selling intoxicating liquors in violation of law, it is competent for a witness, who is shown to have had such an opportunity of personal observation or of experience as to enable him to form a correct opinion, to testify to his opinion as to the intoxicating properties of liquors shown to have been sold by the defendant, although he is not shown to be a technical expert. *Carson v. The State*, 235.

## VII. PAROL AND WRITTEN.

28. *Written contract; when varied by oral agreement.*—Where, by the terms of a written agreement of compromise of a pending suit against a town, on bonds issued and delivered by it to a railroad corporation as security for stock subscribed by the town, and by the railroad corporation assigned to the plaintiff, a judgment for a specified amount, which was less than the face of the bonds, was to be taken by the plaintiff in full satisfaction of the bonds, and no mention was made in such agreement of the stock for the security of which the bonds were issued,—a contemporaneous oral agreement to the effect, that the town, as a part of the consideration moving the plaintiff to make the compromise, was also to transfer to the plaintiff stock in the railroad corporation amounting to eight thousand dollars, would vary, and add an important term to, the written contract, which the law does not allow. *Bank of Mobile v. Mobile & Ohio R. R. Co.*, 305.
29. *Delivery of deed can not be qualified by parol.*—When the possession of a deed to lands is obtained by the grantee from, and by the act of the grantor, or with his consent, it is not permissible for the grantor to prove by parol that the delivery of the deed was conditional or qualified, and not absolute. Any parol negotiation or agreement antecedent to, or contemporaneous with the delivery of the deed, is merged in the delivery, and from that time the conveyance becomes operative according to its terms. *Williams v. Higgins*, 517.
30. *Deed; when want or inadequacy of consideration can not be shown.* Where a deed purports to be founded on a pecuniary consideration, it is not competent for the grantor, in the absence of fraud in its



EVIDENCE—*Continued.*

- execution, to show in a court of law the want, or inadequacy of the consideration expressed in the deed. *Ib.* 517.
31. *Description in conveyance ; when it can be aided by oral testimony.*—A description of lands in a conveyance, by sections, township and range, without mention of the State, county, land district, or government survey, in which the lands lie, may be aided by oral testimony showing, that when the conveyance was made, the grantor owned and resided on lands in a given county, in this State, which were known by the same numbers, as those employed in the conveyance. Aided by such proof, and in absence of proof, that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce the conveyance valid. *Chambers v. Ringstaff.* 140.
32. *Interpretation of a conveyance, aided by oral testimony.*—In such case, the interpretation of the conveyance and judgment upon its validity *vel non*, are questions for the court, while the finding of attendant facts and circumstances are functions for the jury. *Ib.* 140.
- [33. *Consideration of note may be shown.*—In a suit at law on a promissory note, in which the consideration is stated, it is admissible to show by parol evidence a valuable consideration for the note, differing from that expressed therein. *Ramsey v. Young,* 157.

See AMBIGUITY.

VIII. RECORDS.

34. *Transcript ; when seal of court thereto not required.*—A certified transcript of an exemption claim made and filed in the office of the probate judge, is admissible in evidence, although the certificate thereto is not under the seal of the court. *Weis v. Levy,* 209.
35. *Certificate of reversal ; when not competent evidence.*—A certificate of reversal issued by the clerk of this court, can only be looked to as authorizing the lower court to proceed to a new trial in the case to which it relates ; and hence, to prove the fact of such reversal on the trial of another cause, such certificate is not competent evidence, but a transcript from the records of this court, properly exemplified, is the best and only legal evidence of that fact. *Dothard v. Sheid,* 135.
36. *Suit on attachment bond ; what is competent evidence.*—In an action on an attachment bond, the record of the attachment suit is admissible in evidence on behalf of the plaintiff. *Ib.* 135.

IX. VARIANCE.

37. *Variance between allegations and proof.*—Where in an action on an account by K., the complaint counts on a sale of merchandise made by E. & K., as partners, to the defendant, but contains no averment that the account was the property of K., while the proof shows that the merchandise was sold to the defendant by K. & Son, a partnership, and that the account was the property of K., there is a fatal variance between the allegations and the proof. *Wharton v. King,* 365.

See CHANCERY, 81-3.

EXECUTION.

1. *Against partnership.*—When an action is commenced under the statute (Code of 1876, § 2904), against a partnership by its firm name, without naming the individual partners, and a judgment is rendered against the firm as such, an execution issued on such judgment can only be levied on the partnership property. The action

EXECUTION—*Continued.*

- is, therefore, somewhat in the nature of a proceeding *in rem* rather than *in personam*. *Yarbrough & Co. v. Bush & Co.*, 170.
2. *Lands in possession of receiver can not be sold under execution.* When real estate is in the custody of a receiver, it is *in gremio legis*, and a sale thereof under execution issued on a judgment at law is illegal and void. *Dugger v. Collins & McRae*, 324.
  3. *Same*.—A creditor of a devisee, the estate of whose testator was in the possession of a receiver appointed in a suit pending in a court of equity for the settlement and distribution thereof, obtained a judgment prior to the appointment of the receiver, but failed to acquire a lien by placing an execution in the hands of the sheriff until after such appointment; and afterwards he purchased at sheriff's sale made under execution issued on the judgment, but without the leave of the court of equity, the devisee's interest in certain lands belonging to the estate and then in possession of the receiver, receiving the sheriff's deed therefor,—*held*, on the petition of the creditor filed in the administration suit, seeking to be substituted to the rights of the devisee in and to the lands,
    - (a) That he acquired no title by the sheriff's sale and the deed executed thereunder.
    - (b) That even if he had acquired title, its acquisition would have been in disregard of the court's possession and custody of the property, and no sanction could be given to such irregular proceedings, by putting him in possession of property, the title to which had been thus acquired. *Ib.* 324.
  4. *Levy on personal property; when it does not work a satisfaction.* While the taking of goods in execution by a sheriff, of value sufficient to satisfy the writ, generally operates a satisfaction, this is not the effect of such levy, when the personal property levied on, was restored to the possession of the defendant in execution, or to the possession of a claimant, on the execution of a bond for the trial of the right of property. *Rapier v. Gulf City Paper Co.*, 476.

## EXECUTORS AND ADMINISTRATORS.

1. *Executors and administrators; powers of the probate court to compel settlement.*—Under the statutory provisions of this State (Code of 1876, §§ 2508, 2524, 2525, 2528), the jurisdiction of the probate court to compel a final settlement of the accounts of an executor or administrator, after the lapse of eighteen months from the grant of letters, does not depend on the petition of a party interested in the estate, invoking the exercise thereof; but the court may then, *ex mero motu*, compel such settlement, if the condition of the estate will admit of it. *Cook v. Cook Ex'r*, 294.
2. *Same; when debtor appointed, presumption of payment arises.* When letters testamentary or of administration are granted to a debtor of the decedent, the presumption of payment at once arises, without reference to his solvency, or the duration of his administration. *Ib.* 294.
3. *Executors and administrators; when decree on settlement may be rendered in favor of one personal representative against another.*—The only case in which a decree is authorized in favor of one personal representative against another, is where there has been a removal, resignation, or a revocation of the letters, of an executor or administrator, or from some other cause his authority ceases. In such case the decree may be rendered in favor of the remaining or succeeding executor or administrator. *Ib.* 294.
4. *Same; when such decree is not authorized.*—A decree rendered on an account stated by the court under the statute, against one of three executors, whose authority as such had not ceased, and who had

EXECUTORS AND ADMINISTRATORS—*Continued.*

- failed to file his accounts and vouchers and make a settlement of his executorship, after having been duly cited for that purpose, in favor of the other two executors, is unauthorized and erroneous. In such case, the decree should be rendered in favor of the devisees or legatees under the will. *Ib.* 294.
5. *Grant of letters of administration during late war valid ; subsequent grant, without vacancy, void.*—The grant of letters of administration by the probate courts of this State during the late war between the States, was legal and valid ; and a subsequent grant of letters, without a revocation of those already granted, or vacancy in the administration created by some other cause, is absolutely void, and being void, as opposed to voidable merely, it can be collaterally assailed. *Allen v. Kellam*, 442.
6. *Vacancy in administration ; when not presumed from subsequent grant.*—While it may be true that, in a collateral proceeding, a vacancy in the administration of an estate will be presumed to exist, in the absence of any recital or evidence of the fact, from the grant of administration *de bonis non* ; yet, such presumption can not prevail where there is evidence affirmatively showing, that there was no vacancy at the time of the second grant. *Ib.* 442.
7. *Sale by administrator acting under void appointment, also void.*—A sale of real estate, made by one acting as administrator *de bonis non* under a void appointment, is void, and a deed executed by him in pursuance of such sale, does not convey the legal title to the purchaser ; but such title remains in the heirs of the decedent, and will support an action of ejectment brought by them against the purchaser in possession. *Ib.* 442.
8. *Lands of decedent ; power of personal representative to sell.*—Among the unquestionable powers conferred upon the personal representative, is the right to petition for, and obtain an order, to sell the lands of the decedent for the payment of debts ; and when this right is asserted, and the lands are sold and conveyed under the order thus obtained, the title to the land which had descended to the heir, is completely divested ; and notwithstanding the heir may have sold and conveyed lands, or they may have been sold and conveyed as his property, the title the personal representative conveys, is not in the least impaired. *Nelson Ex'r v. Murfee*, 598.
9. *When heir a debtor to ancestor, whether administrator has a prior right to lands descended, quære.*—When the heir is indebted to the estate of the ancestor, and is insolvent, whether the administrator has any prior right to demand payment out of the lands descended, which remain unsold, or whether it becomes a mere race of diligence between him and other creditors of the heir, is a question not raised in this case ; and while the court “ is not prepared to admit it becomes a mere race of diligence,” the question is left open and undecided. *Ib.* 598.
10. *Proceeds of sale of land for payment of debts in hands of personal representative ; its qualities.*—While money acquired by the personal representative from the sale of lands, for payment of debts, and remaining in his hands for distribution after paying the debts, will be treated as having the qualities of land for certain purposes of administration and succession, for all other purposes it is only money in the hands of the administrator ; and any process or procedure to get it out of his hands, must necessarily be that which is adapted to the recovery of money as money. *Ib.* 598.
11. *Same ; personal representative has priority over heir's other creditors.* When a surplus of money thus acquired remains in the hands of the personal representative for distribution, he is entitled to retain the share of an heir or distributee in such moneys in payment of a debt which the latter owes to the decedent's estate, as against, and



EXECUTORS AND ADMINISTRATORS—*Continued.*

in preference to the claim of a judgment creditor of such heir or distributee. *Ib.* 598.

See CHANCERY, 1, 2, 42, 43, 52, 68.

COURT, PROBATE.

NON-CLAIM.

SURETY.

VENDOR AND PURCHASER.

## EXEMPTION.

1. *Judgment for statutory penalty; no exemptions against.*—As against a judgment rendered for the recovery of the penalty given by statute against a mortgagee for failure to enter satisfaction of the mortgage upon the margin of the record, after its payment (Code of 1876, § 2223), there is no constitutional or statutory exemption in this State. *Williams v. Bowden*, 433.
2. *Homestead exemption in favor of widow; by what law determined.* Except as against creditors of a decedent, the right of the widow to a homestead exemption is determined by the law in force at the time of the decedent's death. *Munchus v. Harris*, 506; *Slaughter v. McBride & Latimer*, 510.
3. *Same; may be carved out of equitable estate.*—An equitable title, which the husband had in the homestead, at the time of his death, under a contract of purchase, under which a part of the purchase-money had been paid, but no conveyance of the legal title made, will support a right in the widow (there being no minor children) to a homestead exemption; and such homestead is protected, as against third persons, from levy and sale. *Munchus v. Harris*, 506.
4. *Same; when not affected by removal from the State.*—Under the act of April 23d, 1873, if a man die leaving a widow, but no minor children, and, at the time of his death, he was a resident of this State, and then occupied as a homestead a house and lot, which, under the act, was exempt to him, the right of the widow to a homestead exemption in the lot, as defined by the provisions of the act, attached on the death of the husband; and this right, so far, at least, as concerned the decedent's creditors, was not destroyed by her subsequent removal from the State. *Ib.* 506.
5. *Same; extent of, under act of April 23d, 1873.*—The homestead exemption in favor of the surviving widow and minor child or children, provided by the act of April 23d, 1873, extended only to a mere retention by them of the possession of the homestead, until it was "ascertained whether the estate was solvent or insolvent;" and it only vested in them absolutely in the event of the insolvency of the estate. The ascertainment of insolvency contemplated by the act, was a regular declaration of insolvency by proceedings in the probate court—a *judicial ascertainment* according to the statutory practice regulating such a procedure. *Ib.* 506.
6. *Same; when none exists.*—A widow, whose husband died after the passage of the act of April 23d, 1873, by which all former exemption statutes were repealed, and prior to the passage of the act of February 9, 1877, by which such statutes were re-enacted, is entitled to no homestead exemptions whatever, as against a debt of her husband which was contracted before the constitution of 1868 became binding. *Slaughter v. McBride & Latimer*, 510.
7. *Deed of homestead; when void.*—A deed, executed by a married man of his homestead after the constitution of 1868 went into effect, without the voluntary signature and assent of his wife, is void as a conveyance of the legal title, although the deed was executed in

EXEMPTION—*Continued.*

- payment of a debt contracted by him in 1859; and it will not, therefore, support an action of ejectment brought by the grantee, after the death of the grantor, against the surviving widow of the latter, for the recovery of such homestead. *Slaughter v. McBride & Latimer*, 510.
8. *Debtor's exemption of personal property.*—It is the right of every debtor, resident of this State, under the constitution and the statute enacted for the purpose of giving full effect thereto, to have and to hold, at all times, an exemption of personal property of the value of one thousand dollars, to be selected by him from the property which he may then own, free from liability to the payment of his debts. *Weis v. Levy*, 209.
  9. *Double exemption not allowable.*—A debtor can not have, however, more than one such exemption at the same time; and when such exemption has once been claimed, the property selected by the debtor and allotted to him, so long as he retains it, and it is undiminished in value, he is not entitled to a further exemption. *Ib.* 209.
  10. *When debtor can claim further exemption.*—When the personal property which a resident debtor had selected as exempt, has been taken from him by judicial process, or has been otherwise lost to him, or has deteriorated in value, without fault on his part, or has been consumed in the maintenance of himself or family, or has been applied by him to the payment of his debts, such debtor has the right, in lieu thereof, to select and retain other property as exempt to him, notwithstanding the former claim of exemption. *Ib.* 209.
  11. *Fraudulent disposition of exempt property; its effect on subsequent claim of exemption.*—It seems, that if the debtor were to fraudulently dispose of the property he had claimed and retained as exempt, with the view, and for the purpose of obtaining an additional exemption, his claim to such additional exemption would be disallowed. *Ib.* 209.
  12. *Contest of; when replevy bond executed, and property condemned, verdict should ascertain value of property replevied.*—The verdict of a jury, on the trial of a contest of a claim of exemption filed by defendant in attachment to personal property, on which the writ had been levied, under section 2838 of the Code, finding the property in the contest liable to sale under the attachment, and a judgment of condemnation rendered thereon, will not support an execution issued against the obligors on a forthcoming bond, which was executed on behalf of such defendant under the provisions of section 2836 of the Code, unless the value of the property, for the delivery of which the bond was executed, is by such verdict ascertained. And an execution issued on such bond, without the value of the property replevied having been thus first ascertained, should be quashed. *Levy & Co. v. Moog*, 63.

## FALSE IMPRISONMENT.

1. *Power of marshal of Oxford to make arrest.*—Under the act of the General Assembly incorporating the town of Oxford (Pamph. Acts, 1859-60, p. 383), which was revived and re-enacted by the act of March 1st, 1876 (Pamph. Acts, 1875-6, p. 315), imposing on the marshal of the town the same duties, and conferring upon him the same powers, as are "now conferred by law upon the constables of this State," the marshal has authority to arrest, without warrant, any person threatening to commit a breach of the peace in his presence. *Hayes v. Mitchell*, 452.
2. *Power of such officer to imprison after arrest.*—After the arrest of such person, he should not be imprisoned, unless circumstances ren-

FALSE IMPRISONMENT—*Continued.*

dered his imprisonment necessary. But if by reason of the unreasonableness of the hour, or the inaccessibility of the mayor, or other magistrate having jurisdiction, the offender could not be brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or to protect others or their property from lawlessness, the marshal would be authorized to imprison the offender, until he could be properly brought to trial. *Ib.* 452.

3. *Same; when right to imprison a question for the jury.*—In an action for damages brought against the marshal, based on such arrest, and imprisonment made thereafter, the right to imprison is a question for the jury, under appropriate instructions from the court; and a charge to the jury instructing them, that no circumstances would justify the marshal in imprisoning, without the order of the mayor therefor, is erroneous. *Ib.* 452.

## FINE AND FORFEITURE FUND.

1. *Fine and forfeiture fund of Mobile County; preferred claim against.* Under the provisions of the act of the General Assembly, entitled "An act to establish a Criminal Court in the county of Mobile," approved February 3d, 1846 (Pamph. Acts 1846, p. 29), money disbursed by said county in payment of the salary of the judge of said court, was a preferred claim against the fine and forfeiture fund of the county; and the priority thus given to the claim was not abrogated by subsequent legislation changing the name of the court to "The City Court of Mobile," and increasing the salary of the judge thereof. *The State ex rel. Mobile County v. Stone, Treasurer*, 206.
2. *Fine and forfeiture fund; by whom controlled.*—The commissioners court has no control over fines and forfeitures; but the fund accruing therefrom is in the custody of the treasurer, and is subject to his continued custody until paid out by him pursuant to law. *Ib.* 206.

See MANDAMUS.

## FRAUD AND UNDUE INFLUENCE.

1. *How pleaded.*—Fraud is a mere conclusion of law from facts stated and proved; and when it is pleaded, at law or in equity, the facts from which it is supposed to arise, must be clearly stated, in order that the court may determine whether they constitute fraud. A mere general charge of fraud, or a mere general averment, that an act was done with covinous intent, is not sufficient. *Chamberlain & Parker v. Dorrance*, 40.
2. *Fraud; when it can not be imputed.*—When property is sold and conveyed by a debtor to one of his creditors, absolutely and unconditionally, in payment of a just debt, which exceeded in amount twice the value of the property so sold and conveyed, without reservation to the debtor of any right or interest in the property, or in the proceeds of its sale, neither fraud nor collusion can be imputed therefrom, nor can the other creditors of the debtor thereby suffer legal wrong or injury, although the debtor be then insolvent, which fact is known to the creditor, and the property so sold and conveyed is substantially all the property then owned by the debtor. *Ib.* 40.
3. *Same.*—That a creditor, taking an absolute and unconditional transfer of a stock of goods in payment of his debt, only made a casual examination of the goods, did not make an inventory thereof until



FRAUD AND UNDUE INFLUENCE—*Continued.*

after the sale and a change of possession thereunder, and failed to execute a receipt or release to the debtor, are mere circumstances of suspicion, which are overcome by the fact, that there was an absolute and unconditional sale of the property in payment of a just debt. *Ib.* 40.

4. *Suggestio falsi*; when it will authorize rescission of contract.—If in a negotiation for the purchase of a horse, or preparatory thereto, the party desiring to purchase recklessly, or without knowledge whether it was the truth or not, made a material statement *as fact*, which, if true, would be calculated to influence the conduct of the party selling, and did influence him in making the sale, then, if the statement turned out to be false in fact, this was such a fraud on the seller as would authorize him to rescind the contract. *Smith v. Sweeney*, 524.
5. *Relation of trust and confidence*; when it exists, and its effect upon contracts made between parties sustaining such relation.—Between the owner of a horse and a party who has undertaken to train it for a reward, there exists a relation of trust and confidence; and in addition to the duty of honest, faithful service, the law imposes upon the latter the duty of truthful and faithful report of all within his knowledge affecting the value of the horse; and a purchase of the horse by such party, in person, or through another, without having first made a full and candid disclosure of all that had come to his knowledge, affecting the value and speed of the horse, is a fraud upon the seller, which will authorize him to rescind the contract of sale. *Ib.* 524.
6. *Parties bearing towards each other confidential relations*; dealings between.—The rule, that dealings between parties bearing towards each other confidential relations will be jealously watched by the courts, is not confined to relations strictly fiduciary, but extends to “all the variety of relations in which dominion may be exercised by one person over another.” *Shipman v. Furniss*, 555.
7. *Undue influence*; when inferred.—While undue influence is a species of constructive fraud which the courts will not undertake to define by any fixed principles, its exercise may be inferred in all cases of confidential, or *quasi* confidential relations, where the power of the person receiving a gift, or other like benefit, has been so exercised over the mind of the donor as, by improper arts or circumvention, to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion. *Ib.* 555.
8. *Same*; burden of proof.—Where one, living in illicit sexual relations with another, gives to such person property of considerable value, especially where the donor, in making the gift, excludes natural objects of his bounty, the transaction will be viewed by a court of equity with such suspicion, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. *Ib.* 555.
9. *Same*; its validity as affected by undue influence.—The validity of a conveyance is not affected by the fact that its execution was procured by the exercise of undue influence, if the grantee, being a purchaser for value, did not participate in, or have notice of the wrongful act. *Moog v. Strang*, 98.
10. *Acknowledgment of mortgage*; its effect when attacked for fraud.—Where a mortgage is duly acknowledged before, and certified by a proper officer, in the form prescribed by the statute, this is, in itself, cogent proof of a free agency and absence of restraint in the execution of the mortgage, and raises a presumption in favor of its validity, which can only be rebutted by clear proof of fraud, duress, or

FRAUD AND UNDUE INFLUENCE—*Continued.*

imposition practiced on the mortgagor, in which the officer or mortgagee participated. *Ib.* 98.

See CHANCERY, 11-13, 15.

## NON-CLAIM.

## FRAUDS, STATUTE OF.

1. *When note not affected by.*—A promissory note, under the statute of this State, imports a consideration; and where parties sign as sureties, contemporaneously with the principal, no independent consideration moving to the surety is necessary to bind him. *Lehman v. Levy*, 48.
2. *Promise to answer for debt of another, when within.*—It is only when both liabilities continue to exist—the original debt as a subsisting liability, and the new special promise to answer for such debt—that the statute requires the “agreement, or some note or memorandum thereof, expressing the consideration,” to be “in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.” *Ib.* 48.
3. *When mortgage not affected by.*—Where a mortgage executed to secure the debt of another, for which the mortgagor was in no way liable, contained an obligation on the part of the mortgagee to insure the mortgaged premises for two years, this fulfills the requirement of the statute, that the consideration should be expressed in writing. (Code, 1876, § 2121.) *Moog v. Strang*, 98.
4. *Deposit of title deeds to lands as security, void under.*—The doctrine of the English Court of Chancery, that a deposit of the title deeds to lands for security of a debt is an equitable mortgage, is in violation of the statute of frauds, and can not be maintained in this State. *Lehman, Durr & Co. v. Collins*, 127.
5. *Statute of frauds; what case not affected thereby.*—The statute of frauds has no application whatever to a case where the surety having paid the debt of his principal, seeks reimbursement by the foreclosure of a mortgage executed to him by the principal to indemnify him against loss resulting from his suretyship. *Madden v. Floyd*, 221.
6. *When contract not affected by.*—The first clause of the statute of frauds, declaring void “every agreement which by its terms is not to be performed within one year from the making thereof,” does not apply to a contract the performance of which is dependent upon an event or contingency which may or may not happen within a year; but to contracts, which from their very nature are incapable of performance within that time, or of which, by express stipulation, performance is postponed for a longer period. *Heflin v. Milton*, 354.
7. *Contract for sale of lands; when void.*—The only parol contract for the lease or sale of lands, which can be withdrawn from the present statute of frauds, is where the purchase-money or a portion thereof is paid, and the purchaser put in possession by the seller. These two facts must concur; neither one without the other will satisfy the requirements of the statute. *Ib.* 354.
8. *Same.*—Where no part of the purchase-money has been paid, the statute renders invalid a contract for the sale of lands, unless it is subscribed by the party to be charged. Whether that party be the vendor who is to be deprived of his estate in the lands, or the vendee upon whom the estate is to be forced, if there be not written evidence of the contract, subscribed by him, or by his agent thereunto lawfully authorized in writing, as to him the contract is void. *Ib.* 354.

FRAUDS, STATUTE OF—*Continued.*

9. *Same.*—Although a purchaser, whom it is sought to charge with the payment of the purchase-money, received from the seller, and retained a contract for the sale of lands, duly executed by him, and entered into the possession of the land thereunder; yet not having paid any portion of the purchase-money, the contract is as to him void under the statute and incapable of enforcement. *Ib.* 354.

## FRAUDULENT CONVEYANCES.

1. *Deed fraudulent as to creditors, operative inter partes.*—Conveyances or gifts made to hinder, delay or defraud creditors, when fully consummated, are valid and operative between the parties; and neither party can set up the fraud for the purpose of maintaining, or defeating an action brought by the one against the other. *Williams v. Higgins*, 517.

See CHANCERY, 36.

FRAUD AND UNDUE INFLUENCE.

ADVERSE POSSESSION, 15-17.

FREEDMEN. 1. As to the construction of the ordinance of 29th September, 1865, ratifying and legalizing marriages between, see CONSTITUTIONAL LAW, 11-14.

"FUTURE" CONTRACTS. See CONTRACTS, 1-4.

## GARNISHMENT.

1. *Garnishee can not complain of errors in judgment against defendant.* A garnishee can not take advantage of errors or irregularities in the judgment against the defendant, as the debtor of whom he is summoned to answer. *Security Loan Association v. Weems*, 584.
2. *When notice of proceedings in the cause imputed to garnishee.*—A garnishee, having answered, remains before the court for the purpose of receiving its judgment; and notice of an application by the plaintiff for further answer, and of the order granting the application, is imputed to him. *Ib.* 584.
3. *Future indebtedness growing out of existing contract; continuance for further answer.*—Where a garnishee, in his answer, admits that he holds in pawn or pledge, as collateral security for debts owing him by the defendant, a number of shares of stock in several corporations belonging to the defendant, he thereby discloses a contract, upon which in the future an indebtedness from the garnishee to the defendant could accrue; and in such case the court may with propriety grant the plaintiff a continuance of the garnishment for further answer. *Ib.* 584.
4. *Judgment against garnishee upon subsequent answer.*—Where, in such case, the garnishee subsequently files a further or additional answer, showing that a sale of the stock had been made, and that the proceeds of the sale, in the hands of the garnishee, were more than sufficient to pay the secured debts, an existing indebtedness, springing out of the antecedent contract, is thereby disclosed, which may properly be subjected to the payment of the plaintiff's demand against defendant. *Ib.* 584.
5. *Notice of adverse claim under the statute.*—By the statute authorizing the suggestion by the garnishee of an adverse claim in a third party, etc. (Code of 1876, § 3302), it is not intended that creditors subsequently suing out garnishments shall be suggested as rival claimants and introduced to litigate with the creditor who is first in point of time; and it is not error for the court to refuse to suspend proceedings and cause notices to issue to the parties suing out such subsequent garnishments, on suggestion contained in the garnishee's answer. *Ib.* 584.



## GUARDIAN AND WARD.

1. *Testamentary appointment of guardian ; when instrument effectual as.*—An instrument to be effectual as a testamentary appointment of a guardian for minors must show who is to have the care and nurture of such minors, although the word "guardian" need not be employed. *Describes v. Wilmer*, 25.
2. *Same ; when instrument does not operate as.*—An instrument executed by a father of two minor children, reciting that he was lying in danger of death, and that he had "found kind friends to take charge [of] and raise" his children, and requesting the managers of an asylum, in whose custody the children then were, to place them "in the custody of" a party therein named, shows that it was not the father's intention for such party to have the care, protection and nurture of such children ; and such instrument can not, therefore, be construed as a testamentary appointment of such party as guardian of said children. *Ib.* 25.
3. *An instrument testamentary in its character must be probated.*—An instrument testamentary in its character can not be recognized as valid in any form, until it has been admitted to probate. *Ib.* 25.
4. *Appointment of ; when erroneous.*—A probate judge has no authority to appoint a guardian for minors, for the purpose of having them sent into a foreign country ; and an appointment made upon an application which shows that such is the purpose for which it was sought, is improvident and erroneous, and should be revoked. *Ib.* 25.
5. *Revocation of letters of guardianship ; when notice unnecessary.*—An order revoking an erroneous and improvident appointment of a guardian for minors, made during the same term at which the appointment was made, but on a different day of the term, is free from error, although it was made without notice to the party whose letters were thereby revoked. *Ib.* 25.
6. *Rule of repose of twenty years ; to what debts applicable.*—The rule of repose, which, by common consent of the courts, has been fixed at a period of twenty years, has been declared applicable to all kinds of debts and pecuniary obligations, including fiduciary demands in favor of *cestuis que trust* against trustees ; and the reason of the rule applies with as much force and propriety to guardians as to other trustees. *Garrett v. Garrett*, 429.
7. *Same ; when it begins to run in favor of guardians—quære.*—It is a question of the gravest difficulty as to the time when the rule begins to run in favor of guardians ; and while the question is not decided in this cause, the court incline to the opinion that it begins to run from the last item on the guardian's account, or the last partial settlement, or other clear recognition of the guardianship as a subsisting and undischarged trust, and not from the time when the ward becomes of age. *Ib.* 429.
8. *When ward's right to a settlement not barred.*—Where, on the petition of the ward, the guardian was cited to make a final settlement of his guardianship within less than twenty years from the date of the last partial settlement made by him, and also within less than twenty years from the date when the ward became of full age, the right of the ward to a settlement by the guardian is not barred by the rule of repose. *Ib.* 429.
9. *When statute of limitations begins to run.*—As between guardian and ward, the statute of limitations does not ordinarily commence to run until there has been a termination of the guardianship. *Ib.* 429.
10. *Power of guardian to sell the lands belonging to his ward.*—The probate court has jurisdiction to order the sale of real estate belonging to minors, on the application of the guardian, only in the following cases: (1) For the support and education of the ward (Code, § 2780) ; (2) for reinvestment (*Ib.* § 2785) ; and (3) for

GUARDIAN AND WARD—*Continued.*

distribution among joint owners (*Ib.* § 3514). *Mohon v. Tatum, Guardian, 466.*

11. *When sale of land by guardian void.*—An application to the probate court by a guardian of minors to sell land belonging to his wards, which avers, as the only ground therefor, that he “believes it to be to the interest of said minors that the land of said estate be sold for distribution among the said [minors], or to their guardian for their use, as the lands are not in a state of cultivation, and therefore of no benefit to said minors,” is fatally defective, and a sale made thereon is void. *Ib. 466.*

## HARD LABOR FOR COUNTY.

See CRIMINAL LAW, 11-14.

## HOMESTEAD.

See EXEMPTIONS, 2-7.

## HOMICIDE.

See CRIMINAL LAW, 33-38.

## HUSBAND AND WIFE.

1. *At common law, wife had capacity to take from husband through purchase by him in her name.*—At common law, the wife had full capacity to take from the husband through a purchase made by him in her name. By such a purchase the maxim of the common law that husband and wife, because of their legal unity, could not contract with each other, and of consequence, that the husband could not directly convey to the wife property, real or personal, was not offended, because of the intervention of a third person as the grantor or donor, through and from whose conveyance, the estate or interest was derived, and by which the property was vested in the wife. *Wimbish v. Montgomery M. & B. Association, 575.*
2. *Purchase of real estate by husband in the wife's name ; interest therein.*—If on the purchase of land by the husband, he take a bond for title in the wife's name, whereby the vendor covenants on payment of the purchase-money at a future day, to make title to her, she is thereby invested with an equity in the land, which is irrevocable and indestructible by any subsequent act of the husband, and which, on payment of the purchase-money, becomes perfect and entitles her to a conveyance of the legal title. And if, on payment of the purchase-money by the husband, though with his own funds, he deliver up the bond for title, and at his request, but without the wife's knowledge or assent, the vendor convey the legal estate to a third party, who, in turn, conveys it to another in mortgage to secure a loan then made, nominally to the mortgagor, but, in fact, for the use and benefit of the husband, all parties having full notice of the wife's equity, such mortgagee, although a purchaser for a valuable consideration, takes the legal title *mala fide*, and will not be allowed thereby to defeat the wife's prior equitable estate. *Ib. 575.*
3. *Statutory separate estate of the wife.*—Where the husband purchased real estate and took bond for title in his wife's name, whereby the vendor covenanted to convey to her the legal title on payment of the purchase-money, the equity of the wife arising from such covenant is her statutory separate estate. *Ib. 575.*
4. *Statutory separate estate of wife ; what is.*—If a purchase of personal property is made by the husband with the proceeds of the *corpus* of the wife's statutory separate estate, and no conveyance in writ-

HUSBAND AND WIFE—*Continued.*

- ing is made, and nothing is said at the time of the purchase as to the person for whom it is made, whether for the wife or for the husband, the personal property so purchased belongs to the wife as her statutory separate estate. *Daffron v. Crump*, 77.
5. *Same; income from; the husband's rights therein.*—Crops raised on lands belonging to the wife's statutory separate estate after the marriage, constitute income and profit, which go to the husband as the wife's trustee, and are not subject to the payment of his debts; but if such crops are used by the husband in the purchase of personal property, the trust no longer follows them, but the property so purchased belongs to him, and is subject to the payment of his debts. *Ib.* 77.
  6. *Mortgage of wife's statutory separate estate; when husband by joining in, conveys his life-estate on death of wife intestate.*—Where husband and wife executed a mortgage on lands belonging to her statutory separate estate, in the conveying clause of which the words "bargain and sell" are used, and the wife afterwards died intestate, leaving the mortgage unsatisfied, the life-estate which the husband took under the statute (Code of 1876, § 2714), in said lands, vested *eo instanti* in the mortgagee, to the extent of his mortgage, by virtue of the statutory covenants therein, implied from the use of the words "bargain and sell." *Chambers v. Ringstaff*, 140.
  7. *When plea of coverture no defense to the wife.*—While a married woman can not incur any personal liability by contract, and her coverture is a defense to any action brought to enforce against her a personal liability growing out of a contract made while she is under that disability; yet a plea of coverture is no defense to an action brought under the statute against a partnership by its firm name, of which she was in fact a member, as the effect of such action is not to enforce a personal liability, or to obtain a personal judgment against her. *Yarbrough & Co. v. Bush & Co.*, 170.
  8. *When husband should not join in application by wife to set aside sale in probate court.*—An application to the probate court to set aside, as void, a sale of land belonging to the statutory separate estate of a married woman, made by her guardian before her marriage, should be in the name of the wife alone, and not in the name of herself and husband. *Mohon v. Tatum, Guardian*, 466.
  9. *Same; when application will be dismissed for misjoinder of parties.*—Where an application is made in the probate court by both husband and wife to set aside, as void, a sale of land belonging to the statutory separate estate of the wife, made by her guardian prior to her marriage, and is afterwards amended so as to show that the wife applied by a third party, as her next friend, the husband remaining a party, there is a misjoinder of parties plaintiff, and the application should be dismissed. *Ib.* 466.
  10. *Same; when husband not presumed as suing as next friend of the wife.*—In such case, a third party having been introduced by the amendment as next friend of the wife, the presumption which is sometimes made, that the husband, when joined as party plaintiff with his wife, sues merely as her next friend, is rebutted, and can not prevail. *Ib.* 466.

See CHANCERY, 3-4

## INDICTMENT.

See CRIMINAL LAW, 44-51.

## INJUNCTION.

1. *What not a disregard of.*—Where in a cause pending in the circuit court an application for a change of venue was granted, the dock-



INJUNCTION—*Continued.*

eting of the cause in the court to which it had been removed, is not a disregard of an injunction issued after the order for the change of venue was made. *Ex parte Holton*, 164.

See CHANCERY, 25, 32.

## INSURANCE.

1. *Life insurance; construction of policy.*—A life insurance company, by its policy, after reciting that the advance premium was paid, and the subsequent premiums were to be paid, by Adele F. Van H., insured the life of Hiram W. Van H., for the sole use and benefit of the said Adele, in a stated amount, for the term of his natural life, or until he attained the age of forty-five years; and promised and agreed "to and with the said assured," to pay the sum insured to her or her legal representatives, within ninety days after due notice and proof of the death of the said Hiram W., but further provided, that if the said Hiram W. should live to attain the age of forty-five years, then the sum insured should be paid to him, within ninety days after due notice and proof of his having attained that age. In a suit between Adele F. and an attaching creditor of Hiram W., *held*,

1. That the interest of Adele F. in the policy was contingent upon Hiram W. dying before he attained the age of forty-five years.

2. That the said Hiram W., having lived to attain the age of forty-five years, the money due on the policy was his property, free from any trust in favor of Adele F., and liable to the payment of his debts. *Levy & Co. v. Van Hagen*, 17.

## INTEREST.

1. *Computation of; the statute furnishes the only rule.*—Where partial payments have been made, the statute furnishes the only rule which can be recognized for the computation of interest,—the interest due is first to be paid, and the balance applied to the payment of the principal. (Code of 1876, § 2091.) *Vaughan v. Smith*, 92.
2. *What it is and when recoverable.*—Interest in this State has long been regarded, not as the mere incident of a debt, attaching only to contracts, express or implied, for the payment of money, but as compensation for the use or for the detention of money. Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident. *The State v. Lott* 147.
3. *When recoverable from tax collector.*—Where a tax collector fails to make a final settlement with the auditor, on or before the first day of May, of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof, as required by section 414 of the Code of 1876, he and the sureties on his official bond are liable for interest from that day on the balance then due from him to the State on account of such taxes. *Ib.* 147.
4. As to usury, see BUILDING AND LOAN ASSOCIATION, 2, 7.

## JUDGMENTS AND DECREES.

1. *Inter partes; its effect.*—A judgment *inter partes*, not reversed and not successfully assailed for fraud or on some other ground, is conclusive against the parties thereto who are properly before the court,—against the defendant, that the amount adjudged is due, and against the plaintiff, that no more is due, on account of the

JUDGMENTS AND DECREES—*Continued.*

- contract or liability sued on. *Bank of Mobile v. Mobile & Ohio R. R. Co.*, 305.
2. *Cause of action merged therein.*—Where a compromise was made between the parties pending a suit brought against a municipal corporation by the holder of bonds issued by such corporation, for the purpose of enforcing the collection of the bonds held by him, by which an amount of recovery less than the face of the bonds, and time of payment were agreed on, and afterwards a judgment was entered in the cause pursuant to the compromise, and carrying its stipulations into execution,—the effect of such compromise and the judgment thereon, was to merge the municipal corporation's liability on the bonds in the judgment, thereby destroying the bonds as a cause of action, and leaving the judgment as the only legal evidence of indebtedness from such corporation to the plaintiff growing out of that transaction. And such a judgment would be a bar to any effort made to collect the alleged balance on the bonds so compromised. *Ib.* 305.
  3. *Judgment taken on compromise in full satisfaction of cause of action; effect of.*—The effect of an express term of such compromise and the judgment thereon, that the judgment rendered in pursuance of the compromise was in full satisfaction of the bonds and coupons held by the plaintiff, was to leave the parties as if the plaintiff had never owned or asserted a greater claim against the defendant, than shown by the judgment recovered. *Ib.* 305.
  4. *What essential to their validity.*—Every judgment of a court of law must either be perfect in itself, or capable of being made perfect by reference to the pleadings, or to the papers on file in the cause, or else to other pertinent entries on the court docket; and, in like manner, verdicts of juries can not be supplemented by intendment, or by reference to mere extrinsic facts. *Alexander v. Wheeler*, 332.
  5. *Power of courts of record over.*—The power of a court of record over its judgments during the term at which they are rendered, is very large; and it rests within the sound discretion of the court to set them aside when satisfied that injustice has been done, or that they have been inadvertently or improvidently rendered. *Rich v. Thornton*, 473.
  6. *Same.*—The judgments of courts are in the breast of the judge, until the final adjournment of the term, and they may be set aside or modified at any time during the term at which they were rendered; and, unless the court in such order violate some rule of law, or pronounce a judgment the law will condemn, it is not error that such ruling was made without notice to the opposite party. *Desribes v. Wilmer*, 25.

See ATTACHMENT, 5.

COURT, PROBATE, 2.

GUARDIAN AND WARD, 5.

## JURISDICTION.

See BANKRUPTCY.

JUSTICE OF THE PEACE.

SUMMARY PROCEEDINGS.

## JURORS AND JURY.

See CRIMINAL LAW, 52-54.

JUSTICE OF THE PEACE.

1. *Unlawful detainer ; statute conferring jurisdiction constitutional.*—The statute conferring on justices of the peace jurisdiction in proceedings of unlawful detainer, is not violative of the constitution. *Webb v. Carlisle*, 65 Ala. 313, explained. *Beck v. Glenn*, 121.
2. *Section 3606 of the Code construed.*—Section 3606 of the Code of 1876 requiring suits before justices of the peace to be brought in the precinct of the defendant's permanent residence, or in the precinct in which the debt was created, or in which the cause of action arose, is confined in its operation to suits commenced by summons, and has no reference to suits by attachment of goods, which are in their nature proceedings *in rem*. *Atkinson v. Wiggins*, 190.
3. *Summary judgment against sheriff ; when no provision for.*—The statute does not confer on justices of the peace, or on the circuit court, jurisdiction to render summary judgments against sheriffs, for any negligence or misfeasance on their part in levying process issued by, and returnable before justices of the peace. *Thompson v. Acree*, 178.
4. *Remittitur ; right of party to make, and effect of.*—A plaintiff has a right to reduce his claim, by remitting all over one hundred dollars, so as to bring it within the jurisdiction of a justice of the peace ; but when he does so, he thereby destroys the part of the claim thus remitted. *Wharton v. King*, 365.
5. *Same ; effect on cross demand held by defendant.*—When a plaintiff, before the commencement of his suit, without the defendant's consent, subtracted from his claim the amount of an independent claim which he owed the defendant, intending it as a part payment, and thereby reducing the amount of his claim so as to bring it within the jurisdiction of a justice of the peace ; and then brought suit before that officer for the balance,—*held*, that this amounted to a *remittitur*, and not a payment, and did not impair or affect the cross demand held against him by the defendant. *Ib.* 365.
6. *Same ; what operates as.*—The recovery of judgment before a justice of the peace for one hundred dollars on a claim or demand for a larger amount, is a release or *remittitur* of the balance of the demand. *Davis v. Bedsole*, 362.
7. *When plea in abatement should be filed in justice's court.*—While the rule of practice relating to pleas in abatement in the circuit court can not be literally or technically applied in a justice's court, yet, the reason of the rule applying in such court with equal force, the rule certainly can be there applied, to a certain extent, by analogy. *Beck v. Glenn*, 121.
8. *Same.*—A justice of the peace having declined to permit the defendant in an action of unlawful detainer pending before him, to file a plea of misnomer after the cause had been continued twice on account of the delay, there was no error in the refusal of the circuit court, on appeal by the defendant, to permit him to file the plea in that court. *Ib.* 121.

LANDLORD AND TENANT.

1. *Effect of tenant's holding over after expiration of his term.*—Where a tenant for years holds over after the expiration of his term, the landlord may, at his option, treat him as a tenant and insist upon the continuance of his tenancy for another year ; and if he elect so to do, the law will imply an agreement on the part of tenant to hold or continue the lease for another year upon the same terms and conditions. *Wolfe v. Wolff & Bro.*, 549.
2. *When landlord's right not impaired by act of the tenant.*—In such case, the right of the landlord to insist upon the continuance of the tenancy, is not impaired by the tenant's refusal to renew the lease,



LANDLORD AND TENANT—*Continued.*

- or by notice to the landlord, that he had rented other premises, with the intention to vacate within a few days, or by the fact that such other premises were not ready for him. *Ib.* 549.
3. *When tenant holds over a tender of quantum valebat not sufficient.* Where a tenant who held under a prior lease for a term of one year, holds over for ten days after the expiration of his term, and after notice from the landlord that, if he persisted in holding over, he would elect to charge him as tenant for the next ensuing year, an obligation to pay rent for the whole year was thereby fastened upon him, and a tender by him of a mere *quantum valebat* for the period of actual occupancy, is not sufficient. *Ib.* 549.
  4. *When tenant's liability not affected by second renting.*—In such case, the fact, that after the tenant had abandoned the possession of the leased premises, a party, who was the agent of the landlord, rented the premises to another for a part of the unexpired term, put him in possession and collected the rents, not for and on account of the landlord, but "on account of whom it might concern," does not affect the original tenant's liability, when it is shown that such arrangement was made with the consent of both parties, and with the express understanding that it was to be without prejudice to the rights of either of them. *Ib.* 549.
  5. *Remedy against tenant holding over.*—Where a tenant for years holds over, and the landlord elects to treat him as tenant, an action for use and occupation arising from an implied *assumpsit*, will lie; or, it seems, the landlord may bring an action on the case for special damages. *Ib.* 549.
  6. *When relation exists; landlord's lien.*—A contract by which one rents to another land, to be cultivated for a stipulated part of the crops to be grown thereon, creates between them, under the statute, the relation of landlord and tenant, with all its rights and incidents, including the lien of the landlord for rent and advances. *Wilson v. Stewart*, 302.
  7. *Nature of landlord's lien.*—The lien of the landlord on the crops of his tenant is merely a statutory right to charge the crops with the payment of rent and advances in priority to all other rights or liens; while the property and right of property in the crops remain in the tenant, thus enabling him to make a *bona fide* sale to a purchaser without notice, which would prevail over the landlord's lien. *Ib.* 302.
  8. *Purchaser from tenant; when without notice.*—Notice by a purchaser from the tenant that the crop was raised on land rented from the landlord, and that the rent was unpaid, does not operate as notice that the landlord had advanced to the tenant, or of his lien therefor. *Ib.* 302.
  9. *Landlord's lien on crop; what is not a waiver.*—It can not be affirmed as a general rule, that the mere consent of the landlord to a removal of the crop from the rented premises, is a waiver of his lien, as much must depend on the purposes of the removal and the purposes for which the consent was given. A charge affirming such a general proposition, is too broad, and should be refused. *Tuttle v. Walker*, 172.
  10. *Landlord's lien for advances; none existed from March 18th. 1875, to February 9th, 1877.*—From March 18th, 1875, when the act entitled "An act to amend sections 2961 and 2962 of the Revised Code," was approved (Acts 1874-5, p. 255), until the approval of the act of February 9th, 1877, (Acts 1876-7, p. 74), now embraced in § 3467, *et seq.* of the Code of 1876, the landlord had no statutory lien for advances made by him to tenant. Reaffirming decision on this point in this case on former appeal (59 Ala. 306.) *Wilkinson v. Ketter*, 435.

LANDLORD AND TENANT—*Continued.*

11. *Prior to the statute, notice of relation of landlord and tenant was not constructive notice of contract lien for advances.*—Prior to the adoption of the statute giving a landlord a lien on the crop of the tenant for advances, notice to a third party dealing with the tenant, that he farmed on rented lands belonging to the landlord, did not constitute constructive notice that the landlord had made or would make advances to him, or that the landlord had a lien or mortgage securing such advances. *Ib.* 435.

See ATTACHMENT, 1, 2, 9, 11.

UNLAWFUL DETAINER.

LARCENY.

See CRIMINAL LAW, 55-59.

LEGACY AND DEVISE.

1. *When legacy is, in equity, a charge on real estate devised.*—If real estate is devised upon condition to pay a legacy, or with a direction that the devisee pay the legacy in respect to the estate so devised to him, and because the real estate has been devised to him, such real estate is, in equity, chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption, or from which it can be inferred that the testator intended to exempt the estate devised from that charge. *Sistrunk, Adm'r, v. Ware, 273.*
2. *In determining whether legacy a charge on real estate devised, intention of testator must govern.*—In determining whether a legacy is a charge on real estate devised, the intention of the testator must govern. The intention to charge may be expressed, or the charge may be created by fair and just implication. Whenever it appears satisfactorily that the devise was given on condition, or on the consideration that the devisee should pay the legacy, the real estate will be charged. But such charge can not be implied, when it appears that the testator intended that the legacy should be paid by the devisee from other gifts made to him, although such gifts from any cause may be insufficient for the payment, or may become insufficient from the fault of the devisee. *Ib.* 273.
3. *Construction of will; legacy under, not a charge on real estate devised.* A testator, by the second item of his will, devised and bequeathed to his wife, for the term of her natural life, a large tract of land and the personal property thereon, and by the third item of his will he devised and bequeathed to her absolutely his dwelling house and certain personal property. The fourth item of his will is in these words: "It is my will and desire, and I do hereby give and devise all my moneys and choses in action, that I may have at the time of my death unto my said wife, to have and to hold to her, subject to the following conditions, that is to say, if demands which the law requires to be paid come against my estate, to the amount of ten thousand dollars, or less, my said wife shall settle and pay said demands, not exceeding ten thousand dollars, and shall also pay to my grand-daughter, Kate M., the sum of five thousand dollars, payable at such time as my said wife may deem proper, without interest. If, however, more than ten thousand dollars shall come against my said estate, in debts to be paid to creditors, then it is my will that the balance over and above the sum of ten thousand dollars to be paid, as above, by my said wife shall be borne and paid equally by her and my three children, hereinafter named, in equal proportions." And the eighth item of

LEGACY AND DEVISE—*Continued.*

said will is in these words: "I will and bequeath five thousand dollars to my grand-daughter, Kate M., which five thousand dollars shall be paid to her by my said wife, as is above provided in this will." *Held*, that the devises of the real estate to the testator's wife are specific, distinct from, and independent of the bequest to her of the moneys and choses in action; that they contain no words of charge, but are unconditional; and that the real estate devised is not chargeable with the legacy to the grand-daughter. *Ib.* 273.

Lee CHANCERY, 48-51.

## LIBEL.

1. *Allegations and proof must correspond.*—The general rule, that the allegations and proof must correspond, applies to actions for slander, verbal or written; and the words proved must correspond substantially with the words alleged. *Mohr v. Lemle*, 180.

See AMENDMENT, 8-9.

## LIMITATIONS, STATUTE OF.

1. *Ejectment; design of statute of limitations.*—One of the chief designs of the statute of limitations is to compose controversies growing out of mistakes and errors of description, which tend so greatly to the disturbance of land titles; and knowledge by one in possession claiming title, that his title is defective, does not generally prevent such possession from being adverse, the test being the actual claim, and not the *bona fides* of it. *Alexander v. Wheeler*, 332.
2. *Section 3235 of the Code construed.*—Section 3235 of the Code of 1876, allowing a plaintiff or his legal representative to commence suit again within one year from the arrest of a judgment obtained by him, or from the reversal of such judgment on appeal, although the period limited may in the meantime have expired, refers only to actions at law and judgments therein rendered, and can not be extended, so as to save an action at law, commenced within a year after the reversal of a decree in equity rendered for the same cause and upon the same right of action. *Morrison v. Stevenson*, 448.
3. *Party insisting on exception to, must bring himself within the exception.* Section 3235 of the Code of 1876, is, in its nature and operation, an exception to the general statute of limitations, in that it withdraws from the influence of the statute a particular case, which would otherwise fall within the words and bar of the statute; and a party insisting on the exception thereby created, must point out the exception and bring himself with its saving terms. *Ib.* 448.
4. *Section 3758 of the Code; merely a legislative affirmation of a prevailing principle.*—The statute embraced in Section 3758 of the Code of 1876, providing that the statute of limitations should apply to suits in chancery, is a mere legislative affirmation of the principle which prevailed at the time of its adoption; and it does not extend the exception to the statute of limitations created by section 3235 of the Code, so as to save an action at law, which had been commenced within a year after the reversal of a decree in equity rendered for the same cause and upon the same right of action. *Ib.* 448.
5. *When statute of limitations begins to run.*—As between guardian and ward, the statute of limitations does not ordinarily commence to run until there has been a termination of the guardianship. *Garrett v. Garrett*, 429.



LIMITATIONS, STATUTE OF—*Continued.*

6. *Sale of lands for taxes ; when begins to run.*—The point of time, from which the bar of the statute, prohibiting the institution of an action for the recovery of lands sold for the non-payment of taxes after the expiration of five years from the date of sale (Code of 1876, § 464), is to be computed, is the date of the execution of the deed by the judge of probate, that being the final, consummating act of sale. *Pugh v. Youngblood*, 296.
7. *Same ; effect of the bar of the statute.*—When the purchaser of lands sold for taxes has continued in the open and continuous possession thereof, claiming title, for the period of five years from the execution of the deed of the judge of probate, the statute cuts off all inquiry into the regularity of the sale, and operates a bar to an action brought for the recovery of the land, whatever may be the recitals of the deed, or however erroneous they may be, or whatever may have been the irregularities attending the sale. *Ib.* 296.
8. *When claim for stock killed by railroad company, is barred.*—A claim for damages for stock killed by the train of a railroad company, is barred, where it was not presented as required by statute, and suit was not commenced thereon until after the expiration of six months from the date when the stock was killed. *Alabama Great Southern R. R. Co. v. Killian*, 277.

See COLOR OF TITLE, 1.

MANDAMUS.

1. *A civil remedy.*—Though the origin of the writ of *mandamus* was to prevent disorder from a failure of justice and defect of police, and it is issued in the name of the sovereign, yet its purpose is the enforcement of civil rights, and it can, in no wise, be regarded as a criminal procedure, but is strictly civil in its character. *The State ex rel. Pinney v. Williams*, 311.
2. *Its mandate when applied to judicial acts.*—The writ of *mandamus* will lie from a superior to an inferior court, in a proper case, to compel it to *hear and decide* a controversy of which it has jurisdiction, or, where the cause has been heard, to compel such inferior court to *render judgment or enter a decree* in the given case. But it will not lie to direct *what particular judgment or decree* shall be rendered in a pending cause, or to re-examine or correct errors in any judgment or decree so rendered. *Ib.* 311.
3. *Compliance with mandate may be shown by return thereto.*—A respondent in a proceeding for *mandamus*, may comply with the mandate of the alternative writ, or question its sufficiency, *in law*, by demurrer or motion to quash, or, *in fact*, by plea or answer. When he elects to obey the writ, it is sufficient to set forth this fact by way of return, averring, with sufficient certainty and clearness, his compliance with the mandate of the court, substantially “following the mandatory clause of the writ, and stating his performance of the duty as by the writ commanded.” *Ib.* 311.
4. *When answer thereto sufficient.*—An answer to an alternative writ of *mandamus*, issued on a petition seeking to compel a probate judge to render and enter of record the decree of the court, in a cause therein pending and before him on submission for decree, which shows that the respondent has complied with the mandate of the writ, by rendering and entering of record the decree of the court, as commanded, is sufficient return to such writ, leaving no room for the operation of a peremptory writ. *Ib.* 311.
5. *When replication to answer defective.*—A replication to such an answer, admitting the rendition and record of the decree, but averring that it had been rendered and recorded since the issuance of the

MANDAMUS—*Continued.*

alternative writ, and that the decree had been antedated in such a manner as to deprive the relator of the benefit of a bill of exceptions on appeal, is a manifest departure from the case made by the petition and is therefore fatally defective. *Ib.* 311.

6. *How affected by statute.*—*Mandamus*, as a remedial process, remains as it was at common law, a writ for the enforcement of a clear legal right, for which there is no other adequate legal remedy, except that the statutes (Code of 1876, § 3601; Pamph. Acts, 1878-9, p. 150), have provided authority to controvert the truth of the return, and the machinery therefor. The purpose of these statutes was not to enlarge the scope of the operation of the writ, but merely to cure the delay consequent on the want of authority to controvert the return to the rule *nisi*. *Leigh v. The State, ex rel. O'Bannon*, 261.
7. *To contest the declared result of an election, not within the scope of its operation.*—The result of an election held under an act of the General Assembly, authorizing an election for the purpose of permanently locating the county site of Escambia county, as declared by the board of supervisors, can not be contested by *mandamus*, although no other remedy is provided by law for such a contest. *Ib.* 261.
8. *When it can be invoked.*—The county of Mobile having a preferred claim against its fine and forfeiture fund for moneys disbursed by it in paying the salary of the judge of the City Court of Mobile, has a clear legal right to have any balance in the hands of the treasurer belonging to that fund, not exceeding the amount so paid out by it, transferred from the account of that fund to the account of the general fund of the county; and upon the refusal of the treasurer to make the transfer, the county may compel him to do so by *mandamus*, the county having no other remedy for the enforcement of its right. *The State ex rel. Mobile County v. Stone, Treas.*, 206.
9. *Petition for; when it will be considered by this court.*—This court will not consider a petition for *mandamus*, to compel a probate judge to hear and determine evidence on a writ of *habeas corpus* seeking to review the petitioner's commitment by a justice of the peace on a charge of felony, where the record consists of a petition simply narrative of the facts, and averring that the probate judge declined to take jurisdiction, and dismissed the petition and writ of *habeas corpus*, there being no bill of exceptions, or entry of record showing the action of the court. *Ex parte Smith*, 528.
10. *Proper practice on application for in this court.*—The proper practice in such cases is for the petitioner to reserve a bill of exceptions; and in the absence thereof, the case is not properly presented for the consideration of this court. *Ib.* 528.

See DISCONTINUANCE 3.

## MARRIAGE.

See SLAVERY.

## MECHANICS' LIEN.

1. *Statutory lien of material-man; its extent when materials furnished to the contractor.*—Under the statute giving a lien to mechanics, employees and material-men (Code, §§ 3440-3461), the lien of a material-man for supplies furnished by him under a contract, not with the owner or proprietor, but with the contractor who, under his contract, was to supply the proper materials, exists only when there is a balance due from the owner or proprietor to the contractor, and extends only to such balance.—*Childress v. City of Greenville*, 103.

## MINORS.

See GUARDIAN AND WARD.

## MOBILE, CITY COURT OF.

1. *Salary of judge of.*—Under the provisions of the act of the General Assembly, entitled "An act to establish a Criminal Court in the county of Mobile," approved February 3d, 1846 (Pamph. Acts 1846, p. 29), money disbursed by said county in payment of the salary of the judge of said court, was a preferred claim against the fine and forfeiture fund of the county; and the priority thus given to the claim was not abrogated by subsequent legislation changing the name of the court to "The City Court of Mobile," and increasing the salary of the judge thereof. *The State ex rel. Mobile County v. Stone, Treasurer, 206.*
2. *Jurisdiction and powers.*—The City Court of Mobile, having a jurisdiction, in all cases of a civil nature, indential and co-extensive with that of the circuit courts, excepting only to try titles to land, has the power to issue writs of *mandamus* to probate courts, or to the judges thereof, in all cases warranted by the principles and usages of law.—*The State ex rel. Pinney v. Williams, 311.*

## MOBILE, COUNTY OF.

See FINE AND FORFEITURE FUND.

MANDAMUS, 8.

## MORTGAGES.

1. *Of unplanted crop; title conveyed thereby.*—It is the settled doctrine of this court, that a mortgage executed by the owner or lessee of land on a crop which is not planted, but is to be planted *in futuro*, conveys to the mortgagee, not the legal title, but merely an equitable interest or title. *Mayer & Co. v. Taylor & Co., 403; Collier & Son v. Faulk & Martin, 58; Wilkinson v. Ketler, 435.*
2. *Same; when lien attaches; relation of the parties.*—The lien of such a mortgage attaches as soon as the crop comes into existence; and the mortgagor, or his assignee with notice, becomes a trustee, holding the legal title for the benefit of the mortgagee. *Mayer & Co. v. Taylor & Co., 403.*
3. *Same; priority of lien.*—P. having leased land for farming purposes, in February, and before planting his crop, executed to T. & Co. a mortgage on the cotton crop to be raised on the land during the year by himself, or by his procurement, and soon thereafter, and before the crop was planted, formed an equal partnership with K. who had knowledge of the mortgage to T. & Co., for the cultivation of the land during that year. After the crop was planted the partnership executed a mortgage to M. & Co., they also having knowledge of the mortgage to T. & Co., on the cotton crop to be raised by them during that year on said land, to secure advances made to the firm to enable them to make the crop. A crop having been raised on the land by the partners, they delivered a part of the cotton, after it was gathered, to M. & Co. *Held*, in an action on the case brought by T. & Co. for the recovery of damages for a conversion of the cotton;
  - (a) That the interest which K. took, when the partnership was formed, in the crops to be grown, was subject to the equitable lien already created in favor of T. & Co.
  - (b) That the lien of the mortgage to T. & Co. was superior and paramount to the lien of the mortgage to M. & Co. on the whole crop of cotton raised by the partnership. (STONE, J., *dissenting*,



MORTGAGES—*Continued.*

- held, that T. & Co. had prior lien on P.'s half of the cotton, and only on that half.) Ib. 403.*
4. *Executed to secure future advances ; its validity and operation.*—A mortgage executed to secure future advances, if not tainted with bad faith or fraud, is just as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and encumbrancers, with notice, so far, at least, as respects advances made before the equities of such purchasers or encumbrancers had attached ; nor is it necessary that a *definite or specific* sum should be stated in such mortgage, as the ultimate amount intended to be secured, all that is required being that the mortgage should describe the nature and amount of such advances with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry. *Collier & Son v. Faulk & Martin, 58.*
  5. *When provision in rent contract constitutes a parol mortgage.*—A provision in a parol contract of renting, by which the landlord reserved the right to control and sell the crop to be raised by the tenant on the rented lands, the proceeds of the sale thereof to be applied to the payment of advances made by the landlord to the tenant, created merely a lien or parol mortgage on the unplanted crop of the tenant, for the security of such advances, which did not clothe the landlord with the legal title, nor limit the mortgageable interest of the tenant in the crop to the surplus which might be left after paying the advances. *Wilkinson v. Ketter, 435.*
  6. *When does not contravene public policy.*—A mortgage executed to secure a note made by a cashier of a bank who had defaulted to a surety on his bond as such cashier, for an amount paid for him by the surety in settlement of the civil liability growing out of the defalcation, there being no agreement not to prosecute the cashier criminally, is not illegal and void as against public policy. *Moog v. Strang, 98.*
  7. *Sale of land under power contained in a mortgage ; its effect and operation.*—A sale of land under a power contained in a mortgage is equivalent to a decree of strict foreclosure, cutting off, and barring the equity of redemption, uniting in the purchaser the legal estate vested in the mortgagee, and the equity of redemption residing in the mortgagor, and leaving in the mortgagor or his alienee only the right or privilege of redemption conferred by the statute. *Lehman, Durr & Co. v. Shook, 486.*
  8. *Mortgagor of real estate ; as against strangers, the real owner.*—The mortgagor of real estate must be considered as the real and legal owner against all persons except the mortgagee, and, as against them, he can maintain ejectment for the recovery of the real estate conveyed by the mortgage. *Allen v. Kellam, 442.*
  9. *Of personal property ; payment of debt an extinguishment of mortgagee's title.*—The payment of the debt secured by a mortgage of personal property, whether made before or after the law day, operates an extinguishment of the title of the mortgagee ; and such payment is recognized, and the extinguishment is as operative, in a court of law, as in a court of equity ; and upon such payment the mortgagor may maintain trover or detainue. *Frank v. Pickens, 369.*
  10. *Same ; whether tender of mortgage money an extinguishment of mortgagee's title—quære.*—The weight of authority is, perhaps, that a tender of the mortgage money, made after default, and after the mortgagee has taken possession, will not extinguish the title of the mortgagee under a chattel mortgage ; but the question is left undecided in this case. *Ib. 369.*

MORTGAGES—*Continued.*

See ADVERSE POSSESSION, 1, 2.

AMBIGUITY, 1-3.

ASSIGNMENT, GENERAL, 6-10.

BUILDING AND LOAN ASSOCIATION.

CHANCERY, 22, 32, 42, 44, 46, 61.

DEEDS, 1-6, 12-17.

FRAUDS, STATUTE OF, 3-4.

HUSBAND AND WIFE, 6.

REDEMPTION.

VENDOR AND PURCHASER.

## NEGLIGENCE.

1. *Railroad company ; failure to give signals required by statute ; contributory negligence.*—While the negligence of the employees of a railroad company in failing to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving a depot, is of itself and in itself negligence, involving the company in liability for all injuries to person or property resulting from the failure; still the statute does not relieve one in peril of injury from such failure and consequent negligence, from the duty and necessity of taking ordinary care to avoid the injury, nor does it modify or abrogate the principle, that a plaintiff shall not recover for injuries, not wanton in their character, to which his own negligence directly and immediately contributes. *Central R. & B. Co. of Georgia v. Letcher, 106.*
2. *Contributory negligence ; what will defeat recovery.*—Plaintiff having boarded defendant's passenger train, for a lawful purpose, on its arrival at one of the regular stations on the line of its railroad, was detained by his business until after the train had started on its journey; and while the train was moving from the depot, its speed increasing each moment, he, of his own accord, to prevent being carried off, and without notifying any of defendant's employees of his presence, and without requesting any of them to slow or stop the train, and without any effort to arrest its progress, walked from the platform of one car to that of another, and with papers in his right hand, descended the steps of the car and jumped from the moving train at right angles thereto and fell, and in the fall his left arm was caught under the wheel of the car and crushed. *Held*, that the injury sustained by the plaintiff was attributable directly and immediately to his own thoughtless and reckless act, and he can not therefore recover, though the defendant was negligent in not giving the signals required by the statute, before and at the time the train left the station. *Ib. 106.*

## NEW TRIAL.

1. *When motion must be made and acted on.*—Unless it appears affirmatively from the record, that a motion for a new trial was made, called to the attention of the court and specially continued during the term at which judgment was rendered, the court has no power to entertain it at a subsequent term. *Hundley v. Yonge, 89.*
2. *When it may be heard at adjourned term.*—At an adjourned term under the statute, no limitation as to business having been prescribed in the order of adjournment, the circuit court has the same au-

NEW TRIAL—*Continued.*

thority and jurisdiction as it had at the regular term, of which the adjourned term is a mere continuation; and hence it may hear and grant a motion for a new trial made at the regular term, although the motion had not been specially continued. *Ib.* 89.

3. *Grant on condition to be performed in vacation.*—The granting of new trials on terms and conditions to be performed in vacation, has prevailed too long to be now questioned. *Ib.* 89.

## NON-CLAIM, STATUTE OF.

1. *Operation against claim of heirs or legatees.*—The claim of heirs or legatees against the estate of a deceased administrator, for a *devastavit* committed by him, is barred by the statute of non-claim, unless presented to the personal representative of such administrator, within eighteen months after the grant of letters, or after the accrual of the claim; or, where minors are concerned, within eighteen months after they attain their majority. *Taylor, Adm'r, v. Robinson, Adm'rx*, 269.
2. *Fraud and fraudulent concealment no exception.*—Fraud and fraudulent concealment on the part of the deceased, in reference to the *devastavit*, create no exception against the operation of the statute of non-claim. *Ib.* 269.

## NOTARY PUBLIC.

1. *Notary public, with jurisdiction of justice of the peace.*—The grant of jurisdiction to notaries public appointed by the Governor, to "have and exercise the same jurisdiction as justices of the peace," by the constitution of 1875 (Art vi, § 26, ), is as plenary within their respective precincts and wards, as is the grant to justices of the peace; and whatever is given by statute to render the constitutional jurisdiction of the latter effectual—whatever of process they may employ in the exercise of the jurisdiction granted to them, such notaries public take and may employ, although they are not mentioned *eo nomine* in the statute. *Griffin v. Appleby* 409.
2. *Same; can issue attachment returnable before himself.*—Notaries public appointed to have and exercise such jurisdiction, can issue attachments returnable before themselves, to enforce the collection of debts, not exceeding in amount one hundred dollars. *Ib.* 409.
3. *Same; jurisdiction distinguished from powers.*—There may be, by the statutes, grants of powers to justices of the peace, not affecting their jurisdiction, which the constitution does not confer on notaries public having and exercising only the jurisdiction of justices of the peace. *Ib.* 409.

## NOTICE.

See DEEDS, 11-12.

LANDLORD AND TENANT, 7, 8, 11.

## PARTNERSHIP.

1. *Partnership contracts, joint and several.*—Under the statute partnership contracts and obligations are several as well as joint, whether they are verbal or written; and the members of the partnership may be sued thereon severally or jointly, at the option of the plaintiff. *Hall v. Green & Co.* 368; *Hall v. Cook*, 87.
2. *Action against partnership by its firm name; effect of judgment.*—When an action is commenced under the statute (Code of 1876, § 2904), against a partnership by its firm name, without naming the indi-



PARTNERSHIP—*Continued.*

vidual partners, and a judgment is rendered against the firm as such, an execution issued on such judgment can only be levied on the partnership property. The action is, therefore, somewhat in the nature of a proceeding *in rem* rather than *in personam*. *Yarbrough & Co. v. Bush & Co.* 170.

3. *Same*; *plea of coverture no defense*.—While a married woman can not incur any personal liability by contract, and her coverture is a defense to any action brought to enforce against her a personal liability growing out of a contract made while she is under that disability; yet a plea of coverture is no defense to an action brought under the statute against a partnership by its firm name, of which she was in fact a member, as the effect of such action is not to enforce a personal liability, or to obtain a personal judgment against her. *Ib.* 170.

See CHANCERY, 68.

MORTGAGES, 3.

PAYMENT.

*Presumption of payment; when debtor appointed administrator.*

- When letters testamentary or of administration are granted to a debtor of the decedent, the presumption of payment at once arises, without reference to his solvency, or the duration of his administration. *Cook v. Cook, Ex'r*, 294.

See SET-OFF.

TENDER.

PLEADING AND PRACTICE.

1. *Suit against partnership*.—Under the statute partnership contracts and obligations are several as well as joint; and the members of the partnership may be sued thereon severally or jointly, at the option of the plaintiff. *Hall v. Green & Co.*, 368; *Hall v. Cook*, 87.
2. *Misjoinder of counts*.—The rule of the common law, that counts *ex contractu* and counts *ex delicto* can not be joined, still prevails. *Wilson v. Stewart*, 302.
3. *Amendment causing misjoinder may be stricken from the file*.—An amendment to a complaint containing counts in case and trover, by which it is proposed to add the common counts in assumpsit, would cause a misjoinder; and while in such case the better practice is to put the defendant to his demurrer, as the demurrer would necessarily be sustained to the entire complaint, striking the amendment from the file is at most error without injury. *Ib.* 302.
4. *Demurrer to entire complaint; when should be overruled*.—A demurrer to an entire complaint, consisting of two or more counts, should be overruled, if any one of the counts is sufficient. *Weems v. Weems*, 104.
5. *Pleadings to be construed by the court not by the jury; reference to them by the jury*.—The court should construe the pleadings in a cause, as matter of law, and not submit their construction to the jury; but pleadings being explained by the court, neither party can be prejudiced by any reference to them by the jury during their deliberations, for the purpose of refreshing their memory as to any fact to which they were pertinent. *Alexander v. Wheeler*, 332.
6. *Pleas in abatement not favored by the law*.—Pleas in abatement, being dilatory in their nature, are not favored by the law, and are required to be filed as soon as practicable, so as to prevent the unnecessary accumulation of costs occasioned by protracted delays, and to guard

PLEADING AND PRACTICE—*Continued.*

- against the hazard of a bar by the statute of limitations, in the event of the abatement of the action on some technical ground not going to the merits. *Beck v. Glenn*, 121.
7. *Same; when should be filed in justice's court.*—While the rule of practice relating to pleas in abatement in the circuit court can not be literally or technically applied in a justice's court, yet, the reason of the rule applying in such court with equal force, the rule certainly can be there applied, to a certain extent, by analogy. *Ib.* 121.
  8. *Same; when circuit court committed no error in refusing to allow filed.* A justice of the peace having declined to permit the defendant in an action of unlawful detainer pending before him, to file a plea of misnomer after the cause had been continued twice on account of the delay, there was no error in the refusal of the circuit court, on appeal by the defendant, to permit him to file the plea in that court. *Ib.* 121.
  9. *When plea in abatement sufficient on demurrer.*—A plea in abatement to an attachment which sets forth several defects in the affidavit, some of which are of substance, and others not, is not obnoxious to the rule, which requires that a plea in abatement shall be confined to a single matter of defense. Such defects do not constitute two defenses, but merely two grounds supporting one defense. *Fitzsimmons, Trustee, v. Howard*, 590.
  10. *Plea of former recovery; when sufficient.*—A plea of former recovery is good in bar of an action, commenced by attachment in the circuit court by a landlord against his tenant, for the recovery of rent, exceeding in amount the jurisdiction of a justice of the peace, which avers that after the commencement of the suit the plaintiff brought an action before a justice of the peace to recover \$100 for the identical cause of action; that the plaintiff and defendant both appeared before the justice, and thereupon judgment was rendered in said suit before him for the sum of \$100 and costs, and that the judgment was still of full force and vigor. *Davis v. Bedsole* 362.
  11. *Same.*—The former recovery thus pleaded is not affected by the fact that the attachment before the justice was sued out after the commencement of the suit in which the plea was filed. *Ib.* 362.
  12. *Plea raising immaterial issue; when evidence in support of should be received.*—Where issue is joined on an insufficient plea, it becomes one of the issues to be tried by the jury, and, although it is immaterial, the court has no discretion, but must receive evidence offered in support of the averments of the plea. *Farrow v. Andrews & Co.*, 96.
  13. *Ejectment; plea of guilty, a waiver of a disclaimer.*—In ejectment a plea of not guilty, being an admission of possession by the defendant, is, under our practice, a waiver of a disclaimer also filed by the defendant touching the same land. *Alexander v. Wheeler*, 332.
  14. *Same; plea of statute of limitations also a waiver of a disclaimer.* For similar reasons, it is not permissible to set up by special plea the statute of limitations under an adverse possession, and accompany it with a disclaimer, unless they are made applicable to entirely different parts of the premises sued for. In such case the disclaimer is also waived. *Ib.* 332.
  15. *Action against partnership by firm name; plea of coverture no defense.* While a married woman can not incur any personal liability by contract, and her coverture is a defense to any action brought to enforce against her a personal liability growing out of a contract made while she is under that disability; yet a plea of coverture is no defense to an action brought under the statute against a partnership by its firm name, of which she was in fact a member, as the effect of such

PLEADING AND PRACTICE—*Continued.*

- action is not to enforce a personal liability, or to obtain a personal judgment against her. *Yarbrough & Co. v. Bush & Co.*, 170.
16. *Ejectment; revivor against heirs and personal representatives.*—In ejectment on the death of the defendant in possession, the right to revive the cause against the heirs for the recovery of the possession of the lands sued for, or against the personal representative for the recovery of mesne profits or rents, must be asserted within eighteen months after the death of the defendant, or it will be lost; and when lost, no recovery can be had in that action. *Ex parte Sayre*, 184.
  17. *Same; what can not be regarded as a motion to revive.*—In ejectment, when the death of the defendant in possession "is suggested and proved, and leave granted to plaintiff to revive the suit against his personal representative," the minute-entry neither giving the name of the personal representative, nor adding "when known," this can not be regarded even as a motion to revive; and if no other steps to revive are taken in the cause until after the lapse of eighteen months from the death of the defendant, the right to revive having been thereby lost, the court may, on motion, strike the cause from the docket. *Ib.* 184.
  18. *Rule when benefit of tender is claimed in court.*—When the benefit of a tender of payment of a debt is claimed in court, the money must be produced and placed in the custody of the court, so that, if the tender is adjudged good, the money may be awarded to the party to whom it is then ascertained to rightfully belong. *Frank v. Pickens*, 369.
  19. *When tender of payment is insufficient.*—Where, on the trial of an action of detinue brought by a mortgagor to recover personal property conveyed by the mortgage, upon a tender of payment of the debt secured thereby, made before the commencement of the suit, fifty dollars was deposited with the clerk—sixty dollars having been tendered before suit brought, and the evidence showing that at least the latter amount was due on the debt—and after some evidence had been introduced, ten dollars was added, making sixty dollars in all,—the tender originally made by the mortgagor was not thereby kept good, but was abandoned. No party can thus speculate on the evidence, and defer payment until it is disclosed what is the least sum he can pay, according to its weight or its tendencies. *Ib.* 369.
  20. *Verdict of jury; when void for uncertainty.*—While a general verdict in favor of the plaintiff in an action of ejectment, for the lands described in the complaint, is sufficient; yet, when the verdict is for a part only of such lands, or the finding has no reference to the description given in the pleadings, the boundaries of land recovered must be designated with reasonable certainty, so as to enable the court to pronounce judgment thereon. Otherwise it is void for uncertainty, and can not be sustained. *Alexander v. Wheeler*, 332.
  21. *Same.*—A verdict in favor of the plaintiff for "the land running to Fergusson and Allen line," there being nothing in the pleadings to aid the description, is void for uncertainty, and can not support a judgment of recovery. *Ib.* 332.
  22. As to pleading in suit on attachment bond, see ATTACHMENT BOND, 1-7.
  23. As to pleading and practice in attachment suits, see ATTACHMENT, 1-6, 8, 9.

See, also, AMENDMENT, 8, 9.

DISCONTINUANCE.



PLEADING AND PRACTICE—*Continued.*

See, also, EJECTMENT, 8-9.

GARNISHMENT.

MANDAMUS.

NEW TRIAL.

SET-OFF.

UNLAWFUL DETAINER.

## PRINCIPAL AND AGENT.

See AGENCY.

## PROHIBITION.

1. *Sale of intoxicating liquors ; its regulation by legislation.*—The sale of intoxicating liquors has long been considered in this State a legitimate subject of police regulation ; and it is in the power of the legislature to impose restrictions thereon. *Jones v. Hilliard*, 300.
2. *Same ; special act construed.*—An act of the General Assembly requiring that an applicant for a license to retail vinous, spirituous or malt liquors within a prescribed territory, should procure the recommendation of a majority of the householders and freeholders of the precinct or ward in which he proposes to carry on the business, and furnish satisfactory evidence thereof to the probate judge, is not inoperative because it does not provide any means or machinery for procuring such recommendation, or furnishing such evidence. A compliance with the act is not impossible, although it may impose labor and expense on the applicant. *Ib.* 300.

See CONSTITUTIONAL LAW, 9, 15.

CRIMINAL LAW, 63-5.

ELECTIONS, 2-5.

## QUO WARRANTO.

1. *When not a remedy to contest an election.*—The result of an election held under the act of the General Assembly, approved February 18, 1881 (Pamph. Acts, 1880-1, p. 220), authorizing an election for the purpose of permanently locating the county site of Escambia county, as declared by the board of supervisors, can not be contested by *quo warranto*, or by the statutory proceedings in the nature of a *quo warranto*. *Leigh v. The State, ex rel. O'Bannon*, 261.

## RAILROADS.

1. *Sections 1701 and 1711 of the Code construed.*—Section 1701 of the Code of 1876 was superseded by the later enactment now embodied in section 1711 of that Code, as to the *time* within which the claim for damages for injuries done to stock by a railroad company, should be presented ; but that section still stands as a regulation as to the *manner* in which the claim must be preferred. Hence, the claim must still be in writing, and must be presented to one of the officers or employees named in that section. *Alabama Great Southern R. R. Co. v. Killian*, 277.
2. *What is not a presentation of claim for damages for injuries done to stock by railroad company.*—The giving of notice to a "section boss" of a railroad company by the owner of a horse killed by the train of that company, that he claimed damages for and on account of

RAILROADS—*Continued.*

- the killing of the horse, can not be regarded as a presentation of the claim within the requirements of the statute. *Ib.* 277.
3. *When claim for stock killed by railroad company, is barred.*—A claim for damages for stock killed by the train of a railroad company, is barred, where it was not presented as required by statute, and suit was not commenced thereon until after the expiration of six months from the date when the horse was killed. *Ib.* 277.
  4. *Private property condemned for public uses ; what is just compensation.* Just compensation, under the constitution, to the owner of a city lot, for a part of the lot taken and applied to the use of a railroad company, includes not only the value of the part of the lot so taken and applied, but also the injury resulting therefrom to the remaining parts of the lot ; and if the ways of access to, and egress from, the lot are obstructed, or interrupted thereby, such obstruction or interruption forms a part of the injury, for which the owner is entitled to compensation. *Hooper v. Savannah & Memphis R. R. Co.*, 529.

See CHANCERY, 21.

NEGLIGENCE.

REAL ESTATE.

*Governed by the law rei sitæ.*—Real estate, as to its enjoyment and transmission, is governed by the law of the place where it is situated. *Danner & Co. v. Brewer & Co.* 191.

RECEIVERS.

See EXECUTION, 3.

REDEMPTION.

1. *Bill to redeem by judgment creditor ; offer to redeem, to whom made.* While the statute requires that redemption of lands sold under a power contained in a mortgage, must be made from the purchaser or those claiming under him ; yet, if the purchaser subsequently alienates the lands purchased, the mortgagor or judgment creditor seeking to redeem, must have notice, or information of facts sufficient to put him on inquiry, that the purchaser has divested himself of the title, and who has succeeded to it, before he can be required to make the offer and tender to the alienee of the purchaser. In the absence of such notice or information, it is to the purchaser only he can apply for redemption, and an offer to redeem and tender made to him are sufficient. *Lehman, Durr & Co. v. Collins*, 127.
2. *Offer to redeem ; absence from the State of party to whom it should be made, dispenses with necessity therefor.*—The absence of the party to whom an offer to redeem and tender should be made, dispenses with the necessity of such offer and tender before filing the bill. In such case, the statute is complied with, if the offer and tender are made in the bill, filed within two years. *Ib.* 127.
3. *Redemption of lands ; what liens or claims the party seeking, must satisfy.*—While a judgment creditor, seeking to redeem lands sold under a power contained in a mortgage, is bound to satisfy every lien or incumbrance or claim for which the purchaser would be entitled to hold the lands as security, or to which a court of equity would subject them ; this embraces only liens, legal or equitable, and claims capable of enforcement, and secret trusts, void under the statute of frauds. *Ib.* 127.

REDEMPTION—*Continued.*

4. *To whom application to redeem should be made.*—Where a purchaser of lands at a sale under a power contained in a mortgage subsequently sold the lands, but did not execute to his vendee any deed thereto, the latter taking a conveyance directly from the mortgagor, the registration of such conveyance does not operate as constructive notice to judgment creditors seeking to redeem the lands, of such vendee's claim or title to the lands, and to him they are not required to apply for redemption in the absence of actual notice. *Ib.* 127.
5. *By judgment creditors; what rights acquired thereby.*—Judgment creditors of the mortgagor who redeem lands sold under a power contained in the mortgage, succeed, by operation of law, to the place of the purchaser from whom they redeem, and are entitled to, and may maintain all the rights he could have asserted; and when in possession, they can successfully defend an action of ejectment brought against them by alienees of the mortgagor claiming under a prior deed, which is void as against the mortgage on account of the failure to have it recorded prior to the execution of the mortgage, and within the time prescribed by the statute. *Lehman, Durr & Co. v. Shook*, 486.

See CHANCERY, 61.

## REGISTRATION OF DEEDS.

See DEEDS, 5, 10, 11.

## RELATION, DOCTRINE OF.

1. *Its purpose and operation.*—The doctrine of relation rests in a fiction of law, which was adopted to subserve, and not to defeat right and justice. *Mohr v. Lemle*, 180.

## REMITTITUR.

See JUSTICE OF THE PEACE, 4-6.

## REVENUE.

1. *License to sell liquors not a contract.*—A license issued under the general statute, to a dealer in liquors, is, in no sense, a contract between the State and the licensee, and it is not protected by the contract clauses of the Federal constitution and of the constitution of this State. It is a mere *permit* and can be revoked by the legislature at pleasure. *Powell v. The State*, 10.
2. *License to sell vinous or spirituous liquors; extent of authority conferred.*—A license to sell vinous or spirituous liquors issued to a firm, confers no authority to sell such liquors on another firm, a member of which is also a member of the firm to whom the license was issued. *Wharton v. King*, 365.

## REVIEW, BILL OF.

See CHANCERY, 37-46.

## REIVIVOR.

See CHANCERY, 26-28, 65-68.

EJECTMENT, 8-9.

## RULE OF REPOSE.

See GUARDIAN AND WARD, 6-8.



## SALES.

See CONTRACT, 1, 7, 12—18, 20.

## WARRANTY.

## SET-OFF.

1. *When can not be applied as a payment.*—Set-off is a defense, and may be made or not at the option of the defendant. The plaintiff can not, in the absence of an agreement to that effect, apply it to the payment of his demand. *Wharton v. King*, 365.
2. *Effect on cross demand held by defendant.*—When a plaintiff, before the commencement of his suit, without the defendant's consent, substracted from his claim the amount of an independent claim which he owed the defendant, intending it as a part payment, and thereby reducing the amount of his claim so as to bring it within the jurisdiction of a justice of the peace; and then brought suit before that officer for the balance,—held, that this amounted to a *remittitur*, and not a payment, and did not impair or affect the cross demand held against him by the defendant. *Ib.* 365.

See CHANCERY, 70-74.

## WARRANTY.

## SHERIFF.

1. *Summary judgment against sheriff; when no provision for.*—The statute does not confer on justices of the peace, or on the circuit court, jurisdiction to render summary judgments against sheriffs, for any negligence or misfeasance on their part in levying process issued by, and returnable before justices of the peace. *Thompson v. Agee*, 178.

See CRIMINAL LAW, 14.

## SLAVERY.

1. *Slaves emancipated by ordinance of 22d September, 1865.*—The institution of slavery ceased to have a legal existence in this State from and after the adoption, by the Constitutional Convention of 1865, of the ordinance of 22d September of that year, which declared that thereafter there should not be in this State "slavery nor involuntary servitude, otherwise than as punishment for crime."—(Rev. Code, p. 53.) *Washington v. Washington*, 281.
2. *Marriage between slaves invalid.*—During the existence of slavery, one of the disabilities to which it necessarily subjected the slave, was an incapacity to form the legal relation of husband and wife. Into that relation, depending upon a contract formed by the mutual and concurring assent of the parties to it, and involving mutual obligations and duties, the slave was incapable of entering, because of the paramount rights of the master, to which the will and ability of the slave were subordinated, and which were inconsistent with the power of the slave to contract, and with his yielding the assent, incurring the obligations, and performing the duties incident to marriage. *Ib.* 281.
3. *Same; while invalid, not immoral.*—While slaves were incapable of contracting marriage under the municipal law of force during the existence of slavery, the relation of husband and wife entered into between them with the consent of the master, and solemnized with the customary rites and ceremonies, was not immoral, but imposed a moral obligation, which was recognized and respected by public opinion. *Ib.* 281.

See CONSTITUTIONAL LAW, 11-14.

## SPECIFIC PERFORMANCE.

See CHANCERY, 14, 15, 21.

## STATUTES.

1. *Rule of construction.*—It is the ordinary right of every citizen to contract with reference to his own private property and rights, just as he may see fit, provided only he use his own so as, in no manner, to injure another, and in no wise to offend any principle of public policy; and no law should be construed to abrogate this right unless such is its manifest intention. *Collier & Son v. Faulk & Martin*, 58.
2. *Construction of pre-existing statute adopted by re-enactment of the statute.*—It is a settled rule, that in the adoption of the Code, the legislature is presumed to have known the fixed judicial construction, which pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction. *Morrison v. Stevenson*, 448.
3. *Amendatory statutes; their effect under the constitution.*—Under our constitutional provision, every amendatory statute is, in its nature, a revision of the statute amended, taking the place of the latter. *Bradley v. The State*, 318.
4. *Statutes; construction of amendments to.*—It is a well settled rule of statutory construction, that, in the amendment, or revision, or in the re-enactment of statutes, the mere change of phraseology, or the mere omission of words which may well have been deemed redundant, does not indicate a legislative intent to change the pre-existing law; and before the courts can pronounce a change in the law, such intent must be evident, and language must be employed, which is not susceptible of any other just construction. *Ib.* 318.
5. *Costs in criminal case; section 4731 of the Code, as amended, construed.*—The word *costs* when employed in reference to criminal prosecutions under our statutes, embracing *officers' fees*, the omission of these latter words from the statute amending section 4731 of the Code (Pamph Acts 1880-81, p. 37), does not change or lessen the character of the liability which a defendant convicted of crime can be compelled to discharge by hard labor. *Ib.* 318.
6. *Sale of intoxicating liquors; its regulation by legislation.*—The sale of intoxicating liquors has long been considered in this State a legitimate subject of police regulation; and it is in the power of the legislature to impose restrictions thereon. *Jones v. Hilliard*, 300.
7. *Same; special act construed.*—An act of the General Assembly requiring that an applicant for a license to retail vinous, spirituous or malt liquors within a prescribed territory, should procure the recommendation of a majority of the householders and freeholders of the precinct or ward in which he proposes to carry on the business, and furnish satisfactory evidence thereof to the probate judge, is not inoperative because it does not provide any means or machinery for procuring such recommendation, or furnishing such evidence. A compliance with the act is not impossible, although it may impose labor and expense on the applicant. *Ib.* 300.
8. *Local statute; public in its nature; how pleaded.*—Such statute, though local in its nature, extends to all persons who might come within the territory described, and is a public statute, of which the courts are required to take judicial notice without being pleaded; and an indictment charging a violation thereof is sufficient, which refers to it by its general tenor, and further describes it by the date of its approval. *Carson v. The State*, 235.
9. *Local statute prohibiting sale of liquors; when exception in favor of physicians can not be incorporated by the courts.*—Where a local statute prohibiting the sale of spirituous, vinous or malt liquors

STATUTES—*Continued.*

and intoxicating bitters within a prescribed territory, contains no exception in favor of physicians or druggists, such exception can not be incorporated therein by the courts. *Ib.* 235.

## STATUTORY SEPARATE ESTATE.

See HUSBAND AND WIFE.

## SUBROGATION.

*When doctrine can be invoked.*—The doctrine of subrogation of securities presupposes an existing indebtedness or liability; and it can only be invoked by a creditor or one under liability. *Bank of Mobile v. Mobile & Ohio R. R. Co.* 305.

## SUBSTITUTION OF LOST RECORD.

*What evidence necessary to establish.*—Where, on the hearing of a petition in the probate court, to establish a lost record of proceedings, orders and decrees in said court touching the sale by an administrator of lands belonging to his intestate, and of the deed made by such administrator conveying the lands to the purchaser at such sale, the evidence failed to show that any petition was filed by the administrator praying an order of sale, or that any testimony was taken, or that any order of sale was granted, or that any report of sale, or of the payment of the purchase-money was made, or that the sale was confirmed, or that an order to make title was granted,—a decree of the court, in the absence of such evidence, establishing and substituting the record as prayed in the petition, is erroneous. *McBryde v. Rhodes*, 133.

## SUMMARY PROCEEDINGS.

*Summary judgment against sheriff; when no provision for.*—The statute does not confer on justices of the peace, or on the circuit court, jurisdiction to render summary judgments against sheriffs, for any negligence or misfeasance on their part in levying process issued by, and returnable before justices of the peace. *Thompson v. Acree*, 178.

## SURETY.

1. *Surety of an executor; when equity of is subordinate to the rights of alienees of principal in lands devised by testator.*—A surety of an executor, who has paid a judgment rendered against them, both principal and surety, on a debt due by the testator, and has taken an assignment thereof to himself, may, by bill in equity, alleging the insolvency of the executor (such executor being also a devisee under the will of the testator), reach and subject the individual interest of such executor in lands devised by the testator, so long as such executor remains the owner thereof. But when it is shown that such executor has aliened to others the lands devised to him, upon considerations not assailed, and has thus parted with his interest therein, without fraud, the alienees have not only the legal estate in such lands, but also an equity equal, at least, to any equity that can be preferred by the surety. *Vanderveer v. Ware*, 38.

## TAXES.

1. *Sale of lands for taxes; statute of limitations.*—The point of time, from which the bar of the statute, prohibiting the institution of an action for the recovery of lands sold for the non-payment of taxes



TAXES—*Continued.*

- after the expiration of five years from the date of sale (Code of 1876, § 464), is to be computed, is the date of the execution of the deed by the judge of probate, that being the final, consummating act of sale. *Pugh v. Youngblood*. 296.
2. *Same; effect of the bar of the statute.*—When the purchaser of lands sold for taxes has continued in the open and continuous possession thereof, claiming title, for the period of five years from the execution of the deed of the judge of probate, the statute cuts off all inquiry into the regularity of the sale, and operates a bar to an action brought for the recovery of the land, whatever may be the recitals of the deed, or however erroneous they may be, or whatever may have been the irregularities attending the sale. *Ib.* 296.
  3. *Deed to purchaser of lands at tax sale is color of title, though invalid.* Although a conveyance to the purchaser of lands sold for non-payment of taxes may not recite facts which would support the sale, and for that reason is invalid upon its face, such conveyance constitutes color of title, and possession taken and held under it is adverse, and will not only bar the entry of the true owner, but will ripen into an indefeasible title, if it be continued for the period prescribed by the statute of limitations. *Ib.* 296.

## TAX ASSESSOR.

1. *County taxes levied for special purposes; tax assessors not entitled to commissions on.*—Under the statute regulating the compensation of tax assessors (Code of 1876, § 401), those officers are only entitled to commissions on such county taxes as are levied for the general purposes of the county, or for the ordinary current expenses thereof, and not on county taxes levied for special purposes. *East v. Eichelberger*, 187.
2. *Same.*—A tax assessor is, therefore, not entitled to commissions on taxes which were levied by the court of county commissioners for the purpose of rebuilding or repairing the county jail. *Ib.* 187.

## TAX COLLECTOR.

1. *With what amount chargeable, and to what credits entitled.*—The tax collector, on his settlement with the auditor, is *prima facie* chargeable with all the taxes shown by the assessment book to be due the State; and the only uncollected taxes for which he can be allowed credit, are those contained in the lists of errors and insolvencies reported to, and allowed by the court of county commissioners, and the taxes for the payment of which lands were sold by him; and in the latter case, he must account for the proceeds of sale. *The State v. Lott*. 147.
2. *Failure to collect a breach of his official bond.*—The duty of collecting the taxes is as imperative on the collector as is the duty of honestly accounting therefor, when collected; and a failure to collect, within the period prescribed by law, the taxes which, under the law, he is required to collect, is a breach of the condition of his official bond, equally with a failure to pay over the taxes when collected. *Ib.* 147.
3. *Section 414 of Code of 1876 construed; when final settlement must be made.*—Under section 414 of the Code of 1876, it is the duty of the collector, on or before the first day of May of each year, to make a final settlement with the auditor of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof; and a failure on his part to make such settlement and to pay over such balance on or before that day, whether resulting from his want of fidelity in accounting for the money col-

TAX COLLECTOR—*Continued.*

lected, or from his want of diligence in collecting, is a breach of the condition of his official bond, casting upon the obligors the duty and liability of making compensation for any injury sustained therefrom by the State. *Ib.* 147.

4. *When interest recoverable from.*—Where a tax collector fails to make a final settlement with the auditor, on or before the first day of May, of the taxes of the preceding year, and to pay over to the treasurer the balance due from him on account thereof, as required by section 414 of the Code of 1876, he and the sureties on his official bond are liable for interest from that day on the balance then due from him to the State on account of such taxes. *Ib.* 147.
5. *Auditor has no authority to waive payment of interest due from tax collector.*—The auditor, in making a settlement with a tax collector, has no authority to waive the payment of any interest which the collector may owe the State, or to release him from liability therefor. *Ib.* 147.

## TENANTS IN COMMON.

1. *When parties tenants in common.*—A contract between two parties farming together, by the terms of which one was to furnish the lands and stock and the other the labor, to make a crop, and the crop, when made, was to be divided between them, constituted the parties thereto tenants in common of the crops raised by them under the contract. *Collier & Son v. Faulk & Martin*, 58; *Holcombe v. The State*, 218; *McCall v. The State*, 227.
2. *Sections 3474 and 3475 of the Code construed.*—Sections 3474 and 3475 of the Code did not totally abrogate or abolish the relation of tenants in common in the cases coming within their influence, but only modified it so as to give to each tenant in common a lien on the share of the other in the crops jointly raised, with the remedy of enforcing it by attachment. *Ib.* 58, 318, 227.

## TENDER.

1. *Mortgage of personal property; whether tender of mortgage money an extinguishment of mortgagee's title—quære.*—The weight of authority is, perhaps, that a tender of the mortgage money, made after default, and after the mortgagee has taken possession, will not extinguish the title of the mortgagee under a chattel mortgage; but the question is left undecided in this case. *Frank v. Pickens*, 369.
2. *A tender of payment, to be effectual, must be kept good.*—A tender of payment of the mortgage debt, however, whether made before or after the law day, can not operate to extinguish the title of the mortgagee under a chattel mortgage, unless it is kept good. The tender having been made, the duty rests and continues upon the party making it, to keep the money safely, and be ready to pay it over whenever the other party may manifest his willingness to accept it; and if he neglects this duty, or disables himself from performing it, he thereby abandons his tender. *Ib.* 369.
3. *Rule when benefit of tender is claimed in court.*—When the benefit of a tender of payment of a debt is claimed in court, the money must be produced and placed in the custody of the court, so that, if the tender is adjudged good, the money may be awarded to the party to whom it is then ascertained to rightfully belong. *Ib.* 369.
4. *When tender of payment is insufficient.*—Where, on the trial of an action of detinue brought by a mortgagor to recover personal property conveyed by the mortgage, upon a tender of payment of the debt secured thereby, made before the commencement of the suit, fifty dollars was deposited with the clerk—sixty dollars having been tendered before suit brought, and the evidence showing that

TENDER—*Continued.*

at least the latter amount was due on the debt—and after some evidence had been introduced, ten dollars was added, making sixty dollars in all,—the tender originally made by the mortgagor was not thereby kept good, but was abandoned. No party can thus speculate on the evidence, and defer payment until it is disclosed what is the least sum he can pay, according to its weight or its tendencies. *Ib.* 369.

## TRESPASS.

1. *Trespass de bonis asportatis*; mitigation of damages.—In trespass *de bonis asportatis*, if the defendant holds a mortgage or other lien on the property, he is entitled to have the amount secured thereby deducted by way of recoupment; or if the property has been returned to the plaintiff, this fact is available to the defendant in mitigation of damages. *Bird v. Womack*, 390.
2. *Same.*—But, if the defendant in such action, being a mere trespasser, has himself applied the property seized by him to the plaintiff's use, but without authority, and without the plaintiff's consent, express or implied, this fact is not available to him in mitigation of damages, although the use to which the property was applied, was the satisfaction of a lien which a third party held thereon. *Ib.* 390.
3. *Same.*—In such case it can not be objected that the plaintiff is thus permitted to reap the benefit of double damages, as in trespass, exact compensation is not always the rule. *Ib.* 390.

## TROVER.

1. *Mortgage of unplanted crop will not support.*—It is the settled doctrine of this court, that a mortgage executed by the owner or lessee of land on a crop which is not planted, but is to be planted *in futuro*, conveys to the mortgagee, not the legal title, but merely an equitable interest or title, which will not support trover, trespass or detainue. *Collier & Son v. Faulk v. Martin*, 58; *Wilkinson v. Ketter*, 435; *Mayer & Co. v. Taylor & Co.*, 403.
2. *When contract of sale will not support.*—When in a contract of sale of personal property, any thing necessary to individualize the thing sold, such as weighing, measuring, counting, or separating it from a bulk, is wanting, and the thing sold is, therefore, not susceptible of identification, the title thereto does not pass by the contract to the purchaser, and he can not maintain detainue therefor, or trover for the conversion thereof. *Mobile Savings Bank v. Fry*, 348.
3. *Measure of damages.*—In trover it is competent to prove the highest value of the property alleged to have been converted at any time between the date of conversion and the time of the trial, as it is within the power of the jury, in this action, to assess the damages of the plaintiff at a sum based on such value or on a value not less than that of the property converted at the date of the conversion. *Burks v. Hubbard*, 379.
4. *Same.*—The discretion of the jury, in selecting the exact period of valuation, in trover, should be exercised in such manner as to prevent the defendant from reaping pecuniary profit through his wrongful act, and, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages, as exact justice may require. *Ib.* 379.
5. *Reduction of damages by recovery of property.*—In trover, if the plaintiff regains possession of the property sued for before the trial, this should be estimated in reduction of damages. *Renfro's Admr's v. Hughes*, 581.



TROVER—*Continued.*

6. *Same; measure of damages when property regained.*—In such case, the measure of damages is the actual injury sustained by the plaintiff at the hands of the defendant, including any diminution in the value of the property caused by the defendant's detention or use, the value of the use of the property while detained by the defendant, and all expense the tort of the defendant has put upon the plaintiff in recovering the possession. *Ib.* 581.
7. *Same.*—Where in trover for the recovery of damages for the conversion of a horse, which was stolen from the plaintiff in Georgia and brought to this State by the guilty party and sold to the defendant, who had no knowledge of the theft, the traveling expenses of the plaintiff from his home in Georgia to the place where he found the horse, constitutes no part of the injury done by the defendant to the plaintiff, and can not be recovered. *Ib.* 581.

## TRUSTS AND TRUSTEES.

1. *Under deed declaring naked trusts, no estate or interest passes to the trustee.*—Under the statute abolishing naked or dry trusts (Code of 1876, § 2185), the legal and equitable estates, which a conveyance to a naked trustee would have created at common law, are directly and immediately merged in the *cestui que trust*, and no interest or estate passes thereunder to the trustee. *Wilkinson v. May*, 33.
2. *Settlement by trustee of debt due the trust.*—A settlement by a trustee of a debt due to him as such trustee, whereby he accepted a conveyance of property by the debtor, in payment of the debt, is, at most, only voidable, at the election of the *cestuis que trust*. This right of election is personal to them, and can not be exercised for them by other creditors of the debtor, who seek to set aside the conveyance, and to appropriate to themselves the property conveyed, to the exclusion of the debt, in which the *cestuis que trust* have the beneficial interest. *Chamberlain & Parker v. Dorrance*, 40.
3. *When a court of equity will enforce the interest of a cestui que trust growing out of a voluntary agreement.*—While a court of equity will not, as a general rule, aid a mere volunteer in the enforcement of an executory agreement, nor upon such an agreement, unsupported by a valuable consideration, will create a trust, and establish the relation of trustee and *cestui que trust*; yet, if the trust is actually created, is effectually constituted, it is irrevocable, and a court of equity will enforce the equitable interest of the *cestui que trust*. *Wimbish v. Montgomery B. & L. Association*, 575.

## UNDUE INFLUENCE.

See FRAUD, 6-9.

CHANCERY, 11-13.

## UNLAWFUL DETAINER.

1. *When verdict and judgment sufficient.*—In an action of unlawful detainer, a verdict in these words: "We, the jury, find for the plaintiff for the premises sued for, and assess the rents at one hundred and fifty-one dollars," is sufficient; and a judgment rendered thereon is authorized by the statute, which is for the recovery by the plaintiff of the property described in the complaint, ordering the issuance of a writ of restitution therefor, and which adjudges the costs against the defendant and the sureties on his appeal bond, to the amount of the penalty of the bond, and as to the balance, against the defendant alone; and which also adjudges that the plaintiff recover of the defendant and the sureties on the bond executed to

UNLAWFUL DETAINER—*Continued.*

- prevent the issue of a writ of restitution, the amount assessed by the jury as rents, the penalty of such bond being in excess thereof. *Beck v. Glenn*, 121.
2. *That plaintiff acquired possession before suit brought, no defense.*—The action of unlawful detainer, like the action of ejectment as it exists under the statute, being a *mixed* action in which the plaintiff can recover rent, by way of damages, as well as the possession of the property, it is no defense to the action that the plaintiff regained possession of the premises sued for pending an appeal by the defendant to the circuit court. *Ib.* 121.
  3. *By landlord against tenant; rule as to possession.*—While the general rule is, that, in order to maintain the action of unlawful detainer, the plaintiff must have had prior actual possession of the premises sued for, mere constructive possession not being sufficient; yet, where the action is brought by a landlord against a tenant for unlawfully holding over after the expiration of his term, the tenant is estopped from disputing the fact of the landlord's prior actual possession, and he therefore can not defend by showing that such prior possession was merely constructive. *Ib.* 121.

## USURY.

1. *A transaction sanctioned by the General Assembly can not be usurious.* The General Assembly ordained the statute against usury, and its power to distinguish the transactions which shall be deemed offensive to, or which shall be excepted from the influence of the statute, can not be questioned. When that body lends express sanction to a particular transaction, that transaction is withdrawn, and excepted, from the operation of the statute. *Robinson v. Montgomery M. B. & L. Association*, 413; *Security Loan Association v. Lake*, 456.
2. *How pleaded.*—A party who has made usurious payments on a debt and seeks, by bill in equity, to obtain credit for such payments, must distinctly and correctly set forth in the bill the terms and nature of the usurious agreement and the amounts of the payments which he has made thereon. Under this rule, the averments of the bill in this cause are wholly insufficient to raise the question of usury. *Security Loan Association v. Lake*, 456.

See BUILDING AND LOAN ASSOCIATION, 2, 6. 8.

## VARIANCE.

See CHANCERY, 14, 81-3.

EVIDENCE, 37.

LIBEL.

## VENDOR AND PURCHASER.

1. *Vendor's lien for unpaid purchase-money; when it exists, and against whom enforceable.*—A vendor of lands, who has not taken security, although he makes an absolute conveyance, with a formal acknowledgment that the consideration is fully paid, retains an equitable lien for the payment of the purchase-money, which will be enforced against the vendee and all persons claiming under him, other than *bona fide* purchasers without notice. *Wilkinson v. May*, 33.
2. *Vendor's lien; party disputing must show it has been displaced or waived.*—Such lien, not being dependent upon a specific agreement for its creation, but existing independently thereof, and rest-

VENDOR AND PURCHASER—*Continued.*

ing on the broad principle of equity, that one man ought not, in good conscience, to get and keep the estate of another without paying the consideration money, whoever resists the enforcement of the lien assumes the burden of proving that "it has been intentionally displaced or waived by the consent of parties; and if, under all the circumstances, it remains in doubt, then the lien attaches." *Ib.* 33.

3. *Same; passes by unqualified assignment of the purchase-money.*—A vendor's lien for unpaid purchase-money is, in its very nature, assignable; and as an incident to the debt, it passes with an unqualified assignment or transfer of the note or other evidence of debt given for the purchase-money. *Ib.* 33.
4. *Same; what constitutes.*—Where a husband sold a tract of land and caused the note given for an unpaid balance of the purchase-money to be made payable to his wife, which he delivered to her either as a gift, or as compensation for her relinquishment of dower in other lands which the husband had sold, an irrevocable appropriation or assignment of the unpaid purchase-money was thereby made, requiring no other act on the part of the husband to give it full effect; and with such assignment of the purchase-money, the lien securing the same also passed. *Ib.* 33.
5. *Vendor's lien; when not retained.*—At a sale made by an executor of the lands belonging to his testator's estate, for division, under a private act of the legislature, five of the legatees under the testator's will became jointly the purchasers of a part of the lands, at a price agreed on, payable part in cash, and balance in one and two years. They arranged the cash payment by giving the executor their several receipts in part payment of their respective legacies, and for the deferred payments they executed joint notes. Under the act the sale was reported to, and confirmed by the Chancery Court of Montgomery county. After the maturity of the notes, the purchasers having failed to pay the same, a compromise was made between the executor and all the legatees, by which their several shares under the will were fixed at \$3,000.00, and the purchasers receipted the executor in full for their several shares, and in addition thereto, agreed to pay him, each the sum of \$500.00 in settlement of their notes. Each of the purchasers paid the executor \$500.00 as agreed on, except one, a married woman; and the executor, relying on the promise of her husband, that the \$500.00 to be paid by her, would be shortly paid, reported to the court that all the purchase-money for the lands had been paid; and the court thereupon ordered him to execute a deed, conveying to the purchasers the lands purchased by them, which he did. Afterwards the five purchasers divided the lands purchased by them among themselves, each being allotted a part thereof. The \$500.00 not having been paid, and the executor having, on a settlement with the estate accounted for that sum, as assets thereof collected by him, filed a bill in his individual capacity, claiming a vendor's lien on the part of the lands allotted to the purchaser who owed him that sum for the payment thereof, and seeking to enforce the same. *Held*, that the facts of the case and the conduct of the complainant repel all implication, that a vendor's lien was retained by him for the payment of said sum. *McCarty v. Williams*, 174.
6. *Mortgage; when mortgagee is a purchaser.*—It has long been settled, that a mortgagee is a purchaser, when, contemporaneously with the execution of the mortgage, or with an agreement, afterwards performed, to execute the mortgage, he parted with any thing of value, surrendered an existing right, incurred a fixed liability, or submitted to loss or detriment. *Sweeney v. Bixley*, 539.



VENDOR AND PURCHASER—*Continued.*

7. *Same.*—When the mortgage is made to secure a pre-existing debt, if there be such a valid, binding contemporaneous agreement to extend the debt to a future definite time, as will disable the mortgagee to sue before that time, this is a new present consideration, of benefit to the mortgagor, and also of detriment to the mortgagee, which will constitute the latter a purchaser. *Ib.* 539.
8. *Same; when a mortgagee is not a purchaser.*—If a mortgage is executed to secure a pre-existing debt, and no new contemporaneous consideration passes, either of benefit to the mortgagor, or of detriment to the mortgagee, then the mortgagee does not thereby become a purchaser. *Ib.* 539.
9. *Same.*—A note payable one day after date, given for an ascertained balance on a settlement of pre-existing demands, and contemporaneously with the execution of a mortgage securing the same, must be construed merely as evidencing a present indebtedness. It can not be supposed that the parties thereby intended either a benefit to the promisor, or any detriment to the promisee. The mortgagee is not, therefore, a purchaser as against an older latent right of a third party to the property conveyed by the mortgage. *Ib.* 539.
10. *When a party is a mala fide purchaser.*—The settled doctrine of a court of equity is, “that the person who purchased an estate (although for a valuable consideration), after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.” *Wimbish v. Montgomery M. B. & L. Ass’n*, 575.
11. *Purchase of real estate by husband in the wife’s name; interest therein.*—If on the purchase of land by the husband, he take a bond for title in the wife’s name, whereby the vendor covenants on payment of the purchase-money at a future day, to make title to her, she is thereby invested with an equity in the land, which is irrevocable and indestructible by any subsequent act of the husband, and which, on payment of the purchase-money, becomes perfect and entitles her to a conveyance of the legal title. And if, on payment of the purchase-money by the husband, though with his own funds, he deliver up the bond for title, and at his request, but without the wife’s knowledge or assent, the vendor convey the legal estate to a third party, who, in turn, conveys it to another in mortgage to secure a loan then made, nominally to the mortgagor, but, in fact, for the use and benefit of the husband, all parties having full notice of the wife’s equity, such mortgagee, although a purchaser for a valuable consideration, takes the legal title *mala fide*, and will not be allowed thereby to defeat the wife’s prior equitable estate. *Ib.* 575.
12. *Under contract for the purchase of lands, the vendee is the equitable owner.*—When a valid contract for the purchase of lands has been made, the vendor covenanting to make title on the payment of the purchase-money at a future day, a court of equity, acting on its maxim of treating that as done, which the parties contemplated shall be done in the final execution and consummation of the contract, regards, for most purposes, the contract as specifically executed, and considers the vendor the owner of the purchase-money and the vendee as the equitable owner of the land, attaching to the land a trust in favor of the vendee, which not only binds the land while the legal estate remains in the vendor, but which also binds every one claiming under him, except a *bona fide* purchaser without notice. *Ib.* 575.

VENDOR AND PURCHASER—*Continued.*

See ADVERSE POSSESSION, 1-6.

CHANCERY, 21, 23, 24, 50, 69-73.

STATUTE OF FRAUDS, 7-9.

## VENUE.

See CHANGE OF VENUE.

## VERDICT.

See PLEADING AND PRACTICE, 20, 21.

## WARRANTY.

1. *No implied warranty in sale of guano by one who is not the manufacturer.*—There is no implied warranty in the sale of guano by one who is not shown to have manufactured it, that it was reasonably well adapted to the purposes for which it was purchased; but in such a sale, like that of any other merchandise, the law exacts from the seller only good faith and fair dealing. *Farrow v. Andrews & Co.*, 96.
2. *Expression of opinion not a warranty.*—The mere expression of an opinion by one selling guano, that it was a good fertilizer, does not amount to a warranty. *Ib.* 96.
3. *Sale by manufacturer of manufactured articles; implied warranty.* Where a manufacturer sells an article of his own make or manufacture, the law, in the absence of an express warranty, implies one on the part of the seller, that such article is reasonably fit for the purpose to which it is to be applied. *Snow v. Schomacker Manufacturing Co.*, 111.
4. *Same.*—Where a manufacturer sells a piano, with knowledge that the purchaser is a dealer in pianos and is purchasing to re-sell or let to rent, there is, in the absence of an express agreement to the contrary, an implied warranty, that the material and workmanship are good, that the instrument is adapted to the uses for which it was made and sold, and that it is a reasonably good musical instrument, taking into estimate its class or style and price; and if by reason of defective materials, workmanship or structure, it falls below this standard, there is a breach of the warranty. *Ib.* 111.
5. *Sale of chattels; express warranty construed.*—The words, "Every piano warranted for five years," contained in a contract of sale of pianos by the manufacturer, constitute a warranty, that each piano sold has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale; but they do not warrant the style or grade of the instrument. *Ib.* 111.
6. *Breach of warranty in sale of personal property; when waived; when damages thereunder available under plea of set-off; measure of damages.*—At different times during the years 1875 and 1876, a party residing in this State purchased from a manufacturer in Philadelphia several pianos for the purpose of re-selling or letting them to rent, with warranty that each piano had no inherent defect, either of materials or workmanship, which would cause it to break or give way within five years. In latter part of 1876, the iron plate of one of the pianos cracked, thereby injuring its value and saleableness; and thereupon the purchaser called on the manufacturer to repair the instrument, or to substitute a new and sound one in its place. This, in the spring of 1877, after some correspondence, the manufacturer refused to do. In the latter

WARRANTY—*Continued.*

part of 1877, the purchaser in person purchased of the manufacturer two additional pianos on credit, and agreed to give his acceptance therefor. At the time of this purchase nothing was said by the purchaser of his claim for damages on account of the cracked or broken plate. Afterwards, the purchaser refused to give his acceptance because the manufacturer had failed to repair or make good the crack or break in the plate of the piano about which the correspondence was had, and also because the plate of another of the pianos first purchased had broken or cracked. In a suit brought by the manufacturer for the price of the two pianos last purchased, the purchaser sought to set-off against the plaintiff's demand the damages sustained by him in the breaking of the plates of said pianos,—*held*,

(b) That if such breaks occurred from inherent defects in the material or workmanship of the pianos, this was a breach of the warranty in the sale of the instruments, and legal damages result—therefrom could be made available under the plea of set-off against the plaintiff's demand for the price of the two pianos last purchased.

(b) That the measure of damages in such case is the actual proximate injury sustained, including such expense as was reasonably necessary to repair the instruments and to put them in the condition they would have been in, if there had been no break; the expense of new iron plates, and of putting them in and adjusting the other parts to them, and the expense of transportation to and from the factory, if shipment thereto be necessary to obtain such repairs. But it does not include such items of accidental or extraordinary expense as cartage to and from sub-purchasers, and the temporary use of other pianos in their place.

(c) That the failure on the part of the purchaser to renew his demand for indemnity against the damages which he had sustained from the breaking of the first piano when he made the last purchase, can not, as matter of law, amount to a waiver of the warranty or of the damages resulting from a breach thereof.

(d) That his conduct was, at most, a circumstance to be weighed by the jury in connection with the other evidence, in determining whether he had abandoned his claim for damages, by failing to mention it. *Ib.* 111.

7. *Abatement of damages resulting from a breach of.*—The measure of damages for a breach of a warranty in the sale of lands, on eviction under an outstanding paramount title, is the purchase-money, or consideration, with interest, and the costs of the ejectment suit; and on a bill filed to enforce the vendor's lien for an unpaid balance of the purchase-money, an abatement of the amount of such damages may be allowed. *Kingsbury v. Milner*, 502.

## WILL.

1. *Construction of.*—A testator, by the first clause of his will, after having bequeathed and devised all his estate, real and personal, to his six children, to be divided between them equally when the youngest shall have become of age, provides as follows: "And in case either or any of my children shall die before my estate shall be divided, then it is my will, that the share of such child or children shall be divided equally between the survivors, when partition is made, providing always, that the child or children of such deceased children shall be entitled to their parent's share." By the second clause of the will, he provides as follows: "I desire that my children shall be supported and educated by the rents, issues, and profits of my estate, while it shall be kept together, and I wish



WILL—*Continued.*

that my friend T. shall attend to and manage my domicil for the benefit of my family, and that my executors shall make him such compensation as they may think right and proper for his services. It is my particular request that my young children shall be educated, and that their tuition be paid, as I have said, out of the profits of my estate." A daughter of the testator, after his death, and period of division, married and died, leaving a child. On final settlement by the executors, this child, by his guardian, claimed an account for maintenance and education, after the death of his mother, equal to that which, during the same time, had been allowed to the surviving children of the testator. *Held*,

1. That by the second clause of the will the testator provides solely for the support and education of the testator's own children, the children designated by name in the first clause, constituting his *family*, for whose benefit his domicil was to be attended to and managed by his friend, during the minority of his youngest child; and not for the support and education of a child of a deceased child.

2. That under the will, the executors are charged with the duty of maintaining and educating the children of the testator, and they are not clothed with a power of appointing or disposing of any property to or among them. *Collins, Guardian, v. Toomer, Ex'r, 14.*

2. As to right of insane widow to dissent from will, either in person, or by another, see DOWER, 2-4.
3. When legacy not a charge on real estate devised, see LEGACY AND DEVISE.

## WITNESS.

1. *Subscribing witness; when proof of execution of instrument must be made by.*—On the trial of a defendant indicted for a violation of section 4354 of the Code of 1876, it is error to allow the State to prove by the prosecutor, against the defendant's objection, the execution of a contract between him and the defendant, under which the lien or claim is asserted, and which is attested by a subscribing witness, without having first accounted for the absence of such witness. *Ellerson v. The State, 1.*

## WRIT OF ASSISTANCE.

See CHANCERY. 29-31.









UC SOUTHERN REGIONAL LIBRARY FACILITY



**A** 001 167 808 3

